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o. 84-1273-CFX
tatus: GRANTED

Title: Regents of the University of Michigan, Petitioner
v.
Scott E. Ewing

ocketed:
anuary 29, 1985

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Davis,Peter A., Daane,Rocerick K.

Counsel for respondent: Conway,Michael M.

ntry	Date	Note	Proceedings and Orders
1	Jan 29 1985	G	Petition for writ of certiorari filed.
2	Mar 4 1985		Brief of respondent Scott E. Ewing in opposition filed.
3	Mar 6 1985		DISTRIBUTED. March 22, 1985
4	Mar 25 1985		Petition GRANTED. Further consideration of the motion of respondent for leave to amend the Amended Complaint is deferred to the hearing of the case on the merits. Justice Powell DLT.
			**********
5	Apr 10 1985		Order extending time to file brief of petitioner on the merits until May 30, 1985.
7	May 20 1985		Order further extending time to file brief of petitioner on the merits until June 7, 1985.
8	Jun 5 1985		Brief amicus curiae of Curators of the University of Missouri, et al. filed.
9	Jun 5 1985		Brief amicus curiae of American Council on Education, et al. filed.
10	Jun 6 1985		Record filed.
11	Jun 6 1985		Certified copy of original record 2 C.A. proceedings received.
12	Jun 7 1985		Brief amicus curiae of American Assn. of University Professors filed.
13	Jun 7 1985		Brief of petitioner Regents, Univ. of Michigan filed.
14	Jun 7 1985		Joint appendix filed.
15	Jun 7 1985		Lodging received with amicus brief.
16	Jun 7 1985		Brief amicus curiae of Duke University, et al. filed.
17	Jun 7 1985		Brief amicus curiae of United States filed.
18	Jun 13 1985		Record filed.
19	Jun 13 1985		Certified copy of original pleadings, depositions and transcript received.
21	Jul 2 1985		Order extending time to file brief of respondent on the merits until August 12, 1985.
22	Jul 18 1985		SET FOR ARGUMENT, Tuesday, October 8, 1985. (1st case)
23	Jul 27 1985		Application for leave to file respondent's brief on the merits (A-87) in excess of the page limitation filed,
24	Jul 27 1985		and order denying same by Burger, C.J., on August 1, 1985.
25	Aug 7 1985		CIRCULATED.
26	Aug 12 1985	X	Brief of respondent Scott E. Ewing filed.
27	Aug 12 1985	X	Brief amicus curiae of National Education Association, et al. filed.
28	Aug 12 1985	P	Motion of respondent for leave to amend the amended complaint filed.

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o. 84-1273-CFX

ntry	Date	Note	Proceedings and Orders
29	Aug 21 1985		REDISTRIBUTED. September 30, 1985
30	Sep 26 1985	X	Reply brief of petitioner Regents, Univ. of Michigan filed.
32	Oct 7 1985		Further consideration of the motion of respondent for leave to amend the Amended Complaint is deferred to the
33	Oct 7 1985		hearing of the case on the merits.
34	Oct 8 1985		ARGUED.

84-1273

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,

Petitioner,

v.

SCOTT E. EWING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 29, 1985

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QUESTIONS PRESENTED

I. DOES THE ELEVENTH AMENDMENT, AS CONSTRUED BY A LINE OF DECISIONS CULMINATING IN THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL AND HOSPITAL* v. *HALDERMAN*, BAR THE FEDERAL COURTS FROM ORDERING STATE UNIVERSITIES (AND NOT THE INDIVIDUAL OFFICIALS THEREOF) TO COMPLY WITH DISPUTED, UNWRITTEN STATE UNIVERSITY RULES?

II. UNDER THIS COURT'S DECISION IN *BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI* v. *HOROWITZ*, MAY A STATE MEDICAL SCHOOL'S PROCEDURALLY CORRECT DISMISSAL OF AN ACADEMICALLY DEFICIENT STUDENT BE SUBJECTED TO SUBSTANTIVE DUE PROCESS REVIEW AND REVERSAL BY THE FEDERAL COURTS WITHOUT ANY REGARD FOR THE FACULTY'S SPECIAL EXPERTISE?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

REGENTS OF THE UNIVERSITY OF MICHIGAN,

Petitioner,

v.

SCOTT E. EWING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Regents of the University of Michigan respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 6, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, reported as *Ewing* v. *Board of Regents of the University of Michigan*, 742 F.2d 913 (6th Cir. 1984), appears in the Appendix hereto along with the separate judgment of that court. The opinions of the Distict Court for the Eastern District of Michigan, bearing the same caption, are reported at 552 F.Supp. 881 (E.D. Mich. 1982) and 559 F.Supp. 791 (E.D. Mich. 1983), and also are included in the Appendix. The district court's 1982 opinion was not appealed and only its 1983 opinion was appealed to and reversed by the Sixth Circuit. The final judgment of the district court, entered pursuant to the opinion of the Sixth Circuit, is included at the front of the Appendix.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Sixth Circuit were entered on September 6, 1984. A timely petition for rehearing *en banc* was denied on October 31, 1984, and a copy of such order is also included in the Appendix. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the Constitution of the United States provides in part:

> • • • nor shall any State deprive any person of life, liberty, or property, without due process of law • • •.

Section 1983 of Title 42 of the United States Code provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. • • •

Section 5 of Article 8 of the Constitution of the State of Michigan provides in part:

> The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan • • • .

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Respondent, a former special program medical student, was dismissed from petitioner University of Michigan's Medical School for multiple academic deficiencies after failing the National Board of Medical Examiners ("NBME") Part I examination while on academic warning. Following three faculty review hearings at which his dismissal was unanimously affirmed on the basis of his entire academic record, he brought suit in the United States District Court for the Eastern District of Michigan, claiming violation of his right to substantive due process under 42 U.S.C. § 1983, breach of contract, and promissory estoppel. A trial in that court resulted in a decision against respondent and in favor of petitioner on all grounds. The Sixth Circuit reversed solely on the § 1983 claim and directed the district court to enter an order compelling the University to (a) allow respondent to retake the comprehensive NBME Part I examination, and (b) reinstate him if he passes the examination.

II. STATEMENT OF RELEVANT FACTS

A. The Medical School's Programs And Procedures

The Medical School of the University of Michigan has established several programs by which a student may obtain the M.D. degree.[1] Respondent matriculated in the fall of 1975 as

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[1] These programs are: a standard four-year program designed for students who have already obtained a baccalaureate degree; a six-year integrated pre-medical/medical program known as the Inteflex program

a member of the fourth class of students to enter the Inteflex program, a rigorous and highly specialized sequence of courses designed for and open only to recent high school graduates enrolling in college for the first time.[2] DX 35-40. His progress and performance in this program were carefully reviewed at intervals by the program's faculty board.

The Inteflex Promotion and Review Board is a committee of approximately fifteen Inteflex faculty and course directors empowered to review and pass upon the qualifications of the Inteflex students. Separate faculty boards pass upon the qualifications of students enrolled in the Medical School's other programs. The applicable Medical School bulletin stated that the faculty boards:

> can, at their discretion, approve advancement, require the student to repeat all or part of a year's work, refuse further registration, or take whatever action they may deem appropriate in an individual instance. [DX 36, p. 34.]

All faculty boards deal with their respective students on an individual basis without regard to the situation of any other

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(now a seven-year program); and a seven-year combined M.D./Ph.D. program. At the time of respondent's enrollment, the various Medical School programs maintained separate admission, curricula, review and promotion requirements and procedures. With one exception, the Inteflex students did not take any of their courses with students from the other programs. Tr. I, p. 125; DX 35-40. [Note: record references (Tr. I, II or III, PX, DX, etc.) are to volumes I, II or III of the trial transcript, plaintiff's trial exhibits and defendant's trial exhibits.]

[2] The Inteflex Program was divided into three two-year phases. Phase I consisted predominantly of required and elective college-level science and humanities courses. Phase II encompassed the basic medical science courses, but continued to allow some college level courses as in Phase I. Phase III consisted of required and elective clerkships in a hospital setting in which Inteflex and standard students were totally intermingled for the first time. Tr. I, pp. 146-147.

student. Tr. III, p. 281. The boards examine and discuss the total performance of the student as well as isolated instances of failure. Tr. III, p. 196. Faculty review boards may be petitioned to reconsider their decisions and any adverse decision may be appealed to the Medical School's Executive Committee. Tr. I, p. 63-64; DX 36, p. 34.

B. Respondent's Academic Problems

Respondent's performance in the Inteflex program prior to his dismissal was characterized by repeated shortcomings, academic deficiencies, and irregular progress.[3] During his first year of study, he satisfied only one-fourth of his course work in the regular manner. He required six calendar years to complete the course work normally accomplished in four years; manipulating his schedule and reducing his course loads through incompletes and two leaves of absence. He received psychiatric counseling on several occasions. The biomedical science courses which formed the backbone of the curriculum posed special problems for him. He received incompletes in seven courses, withdrew from another, and failed yet another course, which he was thereafter required to repeat. His failing scores on some course exams were the lowest ever recorded. He often beguiled his professors into allowing him to postpone or retake examinations or to ignore certain of his low mid-semester scores so as to raise his overall course grade average. Three times he was placed on academic probation and warned that any further deficiencies could lead to his dismissal.[4] Indeed, he failed the comprehensive NBME Part I examination while on academic probation.

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[3] The district court carefully detailed respondent's academic progress in its opinion below. Appendix C at 12a-20a; 559 F.Supp. at 793-796.

[4] Every warning letter invited respondent to come into the Dean's office to discuss his academic problems. DX 17, 18 and 19. Respondent never accepted any of these invitations. Tr. III, p. 36-40.

C. The NBME Part I Examination

In June of 1981 respondent sat for Part I of the standardized comprehensive examination promulgated by the National Board of Medical Examiners (the "NBME Part I"). Official bulletins of the Medical School clearly described successful performance on the NBME Part I as a formal requirement both for promotion to the clinical stage of the student's medical education (Phase III for Inteflex students) and for graduation. DX 35-38. Successful performance on the NBME Part I is also a requirement for state licensure.[5] Tr. I, p. 192. All medical students are required to take this examination, Tr. I, p. 148, and failure is treated as a formal deficiency by all faculty review boards. Tr. II, p. 67; Tr. III, p. 248.

The NBME Part I is a two-day multiple choice examination in the basic medical sciences and includes questions on anatomy, behavioral sciences, biochemistry, microbiology, pathology, pharmacology, and physiology. It is designed to test the student's overall knowledge of science disciplines which are regarded as basic to the practice of medicine and a passing score is essential before a student is allowed to proceed from the academic to the clinical phase of his or her medical education. Tr. I, p. 28-30, 147-148. Having remediated[6] the deficiencies in all of his courses, Tr. I, p. 174-175; Tr. II, p. 104, respondent was considered qualified to sit for the NBME Part

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[5] The NBME Part I scores are analyzed on a national mean of 500. Tr. I, p. 190-191. At the time respondent sat for the NBME Part I, the Medical School faculty required a score of 345 for promotion and graduation; the national standard of 380 was required for state licensure. Tr. I, p. 191-192. As of this writing, a score of 380, the national standard, is now required for all purposes. Tr. I, p. 191.

[6] Remediation of those deficiencies meant only that respondent had been allowed to progress through the program, and *not* that all evidence of his previous deficiencies was removed from the faculty review board's consideration of his qualifications to continue in his studies. Tr. I, p. 175; Tr. III, p. 270.

I. Tr. II, p. 104-105; Tr. III, p. 147-148. He was, however, still subject to the faculty board's requirement that he complete Phase II of the Inteflex program in the prescribed fashion and without additional deficiency in order to remain in registration and be promoted. Tr. II, p. 64; DX 18 and 19.

Respondent failed five of the seven subjects and had a total score of only 235 on the NBME Part I examination, well below the cut-off score of 345 then required for passing. DX 9, 10, and 14. His score of 235 was not only the lowest score in his class, but was found by the trial court to be the lowest score ever recorded by a University of Michigan medical student on Part I of the exam. Appendix C at 15a; 559 F.Supp. at 794. Respondent's failure of the NBME Part I constituted a formal deficiency on his record, Tr. III, p. 248, and thus a failure to complete Phase II as prescribed by the board. Tr. II, p. 64-65. As such, he was subject to dismissal. Tr. III, p. 248; DX 18 and 19.

D. The Inteflex Promotion Board's Decision To Drop Respondent And Respondent's Appeals Of That Decision

As was the normal practice in every other instance where a student failed the NBME Part I, respondent's deficient performance on that examination caused him to be brought before the Inteflex faculty board. The board met on July 24, 1981, reviewed respondent's entire academic history, considered the fact that he had been required to complete Phase II without further deficiency, and thereafter voted unanimously that respondent was no longer qualified to continue and should be dropped from the program. DX 9. The faculty board thus believed that respondent's abysmal failure on the NBME Part I merely culminated a long series of unsatisfactory academic performances; it was "the straw that broke the camel's back." Tr. III, p. 277.

As was his right, respondent petitioned the board in writing to reconsider its decision to drop him from registration. DX 21. On July 31, 1981, the board reconvened in special session with seventeen Medical School professors in attendance, and respondent was allowed to appear and present evidence in support of his request. DX 10. Respondent proceeded to outline a series of reasons to explain his poor performance and warrant a retest, reciting a recent romantic disappointment and his diminished preparation time due to his need to make up a previous course deficiency. Tr. III, p. 64-66; DX 10. He also attempted to explain all of his previous course deficiencies and lessen their severity by pointing to an extracurricular literary prize he had received and the honors he had been given in one of his clinical courses as evidence of his ability to perform. DX 10. Several of the board members then asked respondent questions. Tr. III, p. 62-64; DX 10. Respondent agreed that he had exhibited a pattern of inadequate performance, explained that it might have been due to a lack of maturity, but stressed that these tendencies were now behind him. DX 10. In his written petition, he also admitted that he may have overextended himself with extracurricular activities. Tr. III, p. 109; DX 21. He further admitted that he had been fully aware of the meaning of the warning letters he had received, and was "under the gun" when he took the NBME because he knew that if he failed he could be dropped from registration. Tr. III, p. 273; DX 10. The board, after considering his explanations, unanimously voted to affirm its earlier decision. DX 10.

On August 27, 1981, respondent appealed the faculty board's decision to the Medical School's six-member Executive Committee. Tr. III, p. 154; DX 49. He appeared and presented essentially the same reasons as before to explain his failure. The executive committee voted unanimously to affirm the board's decision.

Respondent again appeared before the executive committee on June 17, 1982, and yet a third time on July 29, 1982. DX

50 and 51. He asked to be readmitted to the Medical School, and was allowed to present documentary and testimonial evidence to the committee members. The executive committee on both occasions unanimously voted to affirm respondent's dismissal.

III. PROCEEDINGS BELOW

On July 19, 1982, respondent filed a four-count complaint in the district court seeking both damages and equitable relief. His claim for damages was dismissed prior to trial and was not appealed. Appendix B at 4a; 552 F.Supp. 881. Respondent's equitable claim, which sought an injunction to require the board to allow him to retake the NBME Part I and, if he passed, to reinstate him in the Inteflex Program, was premised on three separate grounds: (1) the violation under color of state law of his right to substantive due process, actionable under 42 U.S.C. § 1983; (2) breach of contract; and (3) promissory estoppel. A non-jury trial was held over four days in January of 1983, during which eight professors testified, and an opinion was filed on March 22, 1983, denying each of respondent's claims. Appendix C at 12a; 559 F.Supp. 791.

On appeal, the Sixth Circuit reversed the district court solely on the basis of respondent's § 1983 claim by focusing exclusively on his contention that he was the only one of 40 University of Michigan medical students who failed the NBME Part I on the first examination and was dismissed for that single failure. Appendix D at 28a; 742 F.2d 913. In so doing it concluded, contrary to the district court, that by failing to follow its "consistent practice" the Medical School necessarily treated respondent in an arbitrary and capricious manner. On the basis of this finding, the Sixth Circuit ordered the relief sought by respondent.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S INJUNCTIVE ORDER IS AGAINST THE STATE OF MICHIGAN ITSELF, IS BARRED BY THE ELEVENTH AMENDMENT, AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL AND HOSPITAL* v. *HALDERMAN*

In both his original and amended complaint, respondent named petitioner "Board of Regents of the University of Michigan" as the only defendant, sought relief against the Board as an entity, and did not name or seek relief against the individual Regents as defendants. Petitioner University was created by the Michigan Constitution[7] and is recognized by the highest court of that state as a fourth branch of state government.[8] Petitioner raised the bar of the eleventh amendment as an affirmative defense and, on motion, the district court dismissed respondent's damage claim, holding on the basis of settled law that petitioner was "a state instrumentality within the meaning of the Eleventh Amendment." Appendix B at 8a; 552 F.Supp. at 884.

In ordering petitioner to allow respondent an examination retest and to then reinstate him in its Medical School if he passes, the Sixth Circuit reversed the district court's fact finding that petitioner had no rule allowing all students two chances at passing the NBME Part I examination. In so order-

[7] "The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan • • • ." Michigan Constitution, Art. 8, § 5.

[8] *Regents of the University of Michigan* v. *State*, 395 Mich. 52, 74, 235 N.W.2d 1, 11 (1975); *Board of Regents of the University of Michigan* v. *Auditor General*, 167 Mich. 444, 450, 132 N.W. 1037, 1040 (1911); and *Sterling* v. *Regents of University of Michigan*, 110 Mich. 369, 377-378, 68 N.W. 253, 255-256 (1896).

ing, the Sixth Circuit necessarily found that the University of Michigan had established a rule (or "consistent practice") which it ignored in dismissing respondent, and the Sixth Circuit's order, plainly and simply, constitutes an unlawful federal court order enjoining the State of Michigan to comply with a disputed state rule.

The eleventh amendment prohibits the federal judiciary from exercising such equitable powers in this suit brought by a California citizen against the State of Michigan. "[W]hen the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst State School and Hospital* v. *Halderman*, — U.S. —, 104 S.Ct. 900, 909 (1984).[9] Apart from the fact that the Regents of the University of Michigan, whether acting individually or officially as a group, are powerless to order the faculty of the Medical School to determine what subjects to teach or what individual students to admit, pass, or fail, and even in the absence of a state rule, the Regents of the University of Michigan cannot be ordered by the federal courts in this case to grant *any* relief to the California respondent at bar because "the State is the real substantial party in interest • • •." *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). *See also Cory* v. *White*, 457 U.S. 85 (1982). The narrow exception of *Ex Parte Young*, 209 U.S. 123 (1908), does not apply because respondent's action was brought against "a body corporate" and not against individual state officials. *Edelman* v. *Jordan*, 415 U.S. 651, *reh'g denied* 416 U.S. 1000

[9] *Pennhurst* was decided long after the district court's second decision following trial in this case, and petitioner, having won at trial, did not argue either the eleventh amendment or *Pennhurst* in its initial brief before the Sixth Circuit. However, the eleventh amendment and *Pennhurst* were raised in the Regents' petition for rehearing *en banc* and, in any event, the bar of the eleventh amendment "may be raised at any point in a proceeding", including on appeal. *Pennhurst, supra*, at 907, n.8.

(1974). *See also Quern* v. *Jordan*, 440 U.S. 332 (1979); *Alabama* v. *Pugh*, 438 U.S. 781 (1978); *Hall* v. *Medical College of Ohio at Toledo*, 741 F.2d 299 (6th Cir. 1984).

In *Pennhurst*, this Court observed that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 104 S.Ct. at 911. In harkening to respondent's talismanic recitation of a "second chance" rule, and in blindly accepting respondent's seductively misleading statistics, the Sixth Circuit has brought into sharp focus the reason for this Court's warning in *Pennhurst*. In implicitly reserving matters of eduction to the several states, our Constitution has permitted medical school education in this country to flourish with the development of large medical centers, such as that at the University of Michigan in Ann Arbor, of premier excellence. Even the Supreme Court of Michigan, in opinions which have withstood the test of time, has refused to interfere with the faculty of the Medical School in establishing its curriculum, selecting its faculty and students, and in passing upon the qualifications of its students.[10]

More than law school,[11] medical school education is designed to rigorously train students to perform decisively and correctly and to make rapid life-saving decisions, even in a crisis atmosphere. For this reason the courses and tests during the curriculum are so arranged and structured as to train medical students for later patient care. Thus, the comprehen-

[10] *People Ex Rel. Drake* v. *Regents of the University of Michigan*, 4 Mich. 98 (1856) (mandamus to appoint homeopathic professor denied); *People* v. *Regents of the University*, 18 Mich. 468 (1869) (state statute requiring appointment of professor of homeopathy unconstitutional); and *Attorney General* v. *Regents of the University*, 30 Mich 473 (1974) (application to require appointment of two professors of homeopathy declined).

[11] On this point see especially *People* v. *Phippen*, 70 Mich. 6, 19-20, 37 N.W. 888, 895 (1888).

sive NBME Part I examination is administered by the faculty of the Medical School immediately after the academic phase and before the clinical phase of a student's education in order to timely test the medical student's fund of knowledge essential to treat human illnesses. In 1981 a score of 345 was required to pass. Respondent earned a score of 235, which the district court found to be the lowest score ever recorded in this history of the Medical School. Appendix C at 15a; 559 F. Supp. at 794. Only the most sanguine educator would expect respondent to pass the examination a second time if he were required to take it under normal conditions, in the midst of a stressful curriculum, competing against fellow students. Yet, the Sixth Circuit's order allows respondent to take the examination after studying for it at his leisure, on his own terms, and on his own time,[12] thus defeating the whole purpose of testing in the medical school curriculum.[13]

The Sixth Circuit's order constitutes education by demoralizing injunction and demonstrates in two other ways why federal courts should not venture into state academic thickets. First, it exceeds even what Michigan's state courts could have ordered had respondent's identical action been brought in those courts, *Maitland* v. *Wayne State University*, 76 Mich.

[12] The district court's final judgment of December 4, 1984, included as Appendix A hereto, was entered pursuant to the Sixth Circuit's order and was drafted by counsel for respondent. It shows that respondent has selected September of 1986 as the date for his second sitting of the NBME Part I examination, thus giving him some five years after his failure of the examination to prepare for a retest, whereas his former classmates had just a few days to prepare for such examination. Furthermore, the final judgment states that respondent is to be graded under 1981 standards (passing score of 345), even though the Medical School's present passing score is 380 for all students.

[13] The opening essay of a leading textbook on medicine teaches that "the practice of medicine cannot be sealed off into convenient hours • • •." R. Cecil, *Textbook of Medicine* at xxxvi (J. Wyngaarden & L. Smith 16th ed. 1982).

App. 631, 639-640, 257 N.W.2d 195, 200 (1977) (state courts cannot order reinstatement, only rehearing at university level), and second, it orders petitioner to perform an academically impossible task since only students who are officially enrolled in United States or Canadian medical schools may sit for the NBME Part I examination.[14]

The lower court's order thus is a dangerous precedent that seriously threatens all medical school education in this country. Indeed, it has sounded a shock wave throughout the community of medical schools in the United States and has dispirited respondent's professors, some of whom devoted more than a hundred hours in reviewing his academic record. Tr. III, p. 275. If allowed to stand and if followed by other courts in other jurisdictions, it could require the faculties of medical schools to abandon their carefully developed and longstanding evaluative processes in favor of woodenly applied standards which could signal the end of high-quality medical school education in this country.

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[14] The NBME examinations are administered by the National Board of Medical Examiners, an independent entity headquartered in Philadelphia and not a party to this action. The University of Michigan cannot sponsor a dismissed, non-enrolled student for the examination. See the Official Bulletins of the National Board of Medical Examiners.

II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING QUESTIONS CONCERNING ISSUES LEFT OPEN BY THIS COURT'S DECISION IN *BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI* v. *HOROWITZ* AND CANNOT BE RECONCILED WITH THE DIVERSE AND GROWING PROGENY OF THAT DECISION.

In *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978), this Court defined the procedural protections which a student at a state medical school may invoke pursuant to 42 U.S.C. § 1983 when subject to dismissal for academic reasons. In leaving open the question whether federal courts may review the substance of a state university's procedurally correct decision to dismiss a student for purely academic reasons, this Court cautioned:

> Courts are particularly ill-equipped to evaluate academic performance. The factors discussed in Part II [of this decision] with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decisionmaking. [Footnote omitted. *Id.* at 92.]

It is a putative substantive due process claim which forms the heart of respondent's case herein.[15]

The quoted passage from *Horowitz* has troubled the courts of appeal and the district courts which have since had occasion

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[15] In its decision below, the Sixth Circuit stated that "[b]ecause we believe this case can be disposed of on the Section 1983 claim, this Court does not expressly reach the [respondent's] breach of contract or promissory estoppel claims." Appendix D at 30a, n. 2; 742 F.2d at 914, n. 2. Indeed, respondent admitted from the beginning that his right to procedural due process was not violated. (Plaintiff's Amended Complaint dated November 10, 1982, and Plaintiff's Trial Brief dated January 15, 1983.)

to address substantive due process claims in the context of academic decisions. The lower courts have disagreed as to the circumstances under which a court may review such decisions. Some courts have held that this Court's admonition in *Horowitz* forecloses substantive judicial review altogether. *Lavash* v. *Kountze*, 473 F.Supp. 868 (D.Mass.), *aff'd* 604 F.2d 103 (1st Cir. 1979); *Hubbard* v. *John Tyler Community College*, 455 F.Supp. 753 (E.D.Va. 1978). Other courts have avoided the issue by finding that regardless whether such a cause of action exists, no arbitrary or capricious conduct had been demonstrated. *Hines* v. *Rinker*, 667 F.2d 699 (8th Cir. 1981); *Stevens* v. *Hunt*, 646 F.2d 1168 (6th Cir. 1981). Still other courts have suggested that such a cause of action may exist when certain facts can be demonstrated. *Aubuchon* v. *Olson*, 467 F.Supp. 568 (E.D. Mo. 1979); *Watson* v. *University of South Alabama College of Medicine*, 463 F.Supp. 720 (S.D. Ala. 1979). The Sixth Circuit alone, in the opinion below, has explicitly stated that such a cause of action does exist. Appendix D at 32a; 742 F.2d at 915.

If such a cause of action exists, which petitioner denies, public policy demands that the courts maintain their traditionally deferential approach to difficult questions of academic decisionmaking if high quality medical school education is to survive in this country. Indeed, nearly three decades ago this Court warned of the "grave harm resulting from governmental intrusion into the intellectual life of a university, • • •." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 261 (1957) (Frankfurter, J., concurring). The district court below recognized that substantive review of decisions involving academic qualifications cannot be equated with traditional notions of substantive due process review. Appendix C at 24a; 559 F.Supp. at 798. Other courts likewise have recognized that any substantive review of academic decisions should be indulged in with this deference in mind and in light of *all* the circumstances contributing to the academic decision in controversy. *Hines* v. *Rinker*, *supra*; *Stevens* v. *Hunt*, *supra*; *Watson* v. *University of South Alabama College of Medicine*, *supra*; *Connelly* v. *University of Vermont*, 244 F.Supp. 156 (D.Vt. 1965). Remarkably, the Sixth Circuit not only failed to acknowledge that these restrictions governed its analysis of respondent's claim, but that court never even addressed the numerous scholastic factors upon which the medical faculty's decision to dismiss respondent was largely based.

While *Horowitz* did not expressly detail the precise elements which would form the basis of a substantive due process action, it implied that an aggrieved party must prove, as must the plaintiff in a procedural due process action, that he was deprived of a right secured by the Constitution of the United States and that the deprivation occurred under color of state law. 435 U.S. at 91-92. Significantly, *Horowitz* also implied that, if academic dismissals also can be enjoined on substantive due process grounds, the aggrieved party must further show the dismissal to have been clearly arbitrary and capricious. *Id.* It is on the application and interpretation of this latter requirement that the decision below misinterprets the guiding principles in *Horowitz* and departs from the decisions of all other courts which have addressed the issue.

The Sixth Circuit nominally adopted the arbitrary and capricious standard articulated in its earlier decision in *Stevens* v. *Hunt*, *supra*: "'In order to establish such arbitrary and capricious action, the plaintiffs must show that there is no rational basis for the University's decision, or that the decision to dismiss was motivated by bad faith or ill will unrelated to academic performance.'" Appendix D at 32a; 742 F.2d at 915.[16] As the Sixth Circuit did not disturb the district court's

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[16] The Eighth Circuit defined the arbitrary and capricious requirement in almost identical language in *Hines* v. *Rinker*, 667 F.2d 699, 703 (8th Cir. 1981). *Compare Gaspar* v. *Bruton*, 513 F.2d 843, 851 (10th Cir. 1975) (relief may be granted "only in those cases where the student presents positive evidence of ill will or bad motive"); and *Watson* v. *University of South Alabama College of Medicine*, 463 F. Supp. 720,

finding that petitioner's decision was not motivated by "bad faith, ill will or other impermissible ulterior motives," Appendix C at 26a; 559 F.Supp. at 799, it was required to uphold that decision if it could in any manner be grounded in reason. Indeed, on this point the Sixth Circuit's opinion is irreconcilably in conflict with a pre-*Horowitz* decision of the District of Columbia Circuit. In *Williams* v. *Howard University*, 528 F.2d 658 (D.C. Cir.), *cert. denied* 429 U.S. 850, (1976), that Circuit refused to condemn a medical school's executive committee for misapprehending the assignment of a grade of "unsatisfactory" because substantive review was not warranted, "taking into acount the nature of plaintiff's record as a whole * * *." *Id.* at 659, n. 1.

The required judicial deference to academic decisions is based on a time-proven presumption that such decisions, made by teachers who are highly educated and experienced in their specialized fields, are correct. *Gaspar* v. *Bruton*, 513 F.2d 843, 850 (10th Cir. 1975). The aggrieved student therefore must produce clear and convincing evidence to overcome this presumption if he is to prevail on his claim. That respondent was unable to make this required showing below is evident in that the trial court found in favor of petitioner. In essence, then, the Sixth Circuit's reversal amounts to a holding that respondent was entitled to a retest on the NBME, despite his egregious academic history, solely because 40 other students had been afforded such opportunity.[17] Since there was more

727 (S.D. Ala. 1979) (relief may be granted only "where there was evidence that a student with an academic record and an individual history very similar to the plaintiff's was afforded substantially different treatment").

[17] Respondent's evidence on this issue was wholly statistical. But, since "[n]o matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution," *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981), this single fact does not demonstrate that the faculty's action was arbitrary and capricious.

than adequate support for the trial court's finding to the contrary,[18] and since the Sixth Circuit in conducting its review was guided by the principle that "fact finding is the basic responsibility of district courts, rather than appellate courts," *DeMarco* v. *United States*, 415 U.S. 449, 450 n. (1974) (per

[18] Petitioner argued that respondent's contention was factually misleading for the following reasons:

(1) Respondent's dismissal was not solely the result of his failure on the NBME; rather, the faculty decided to dismiss him only after thoroughly reviewing his entire academic record.

(2) Respondent's figure of 40 students was derived by combining 32 Standard students with eight Inteflex students. This was improper because, as shown above, these two groups of students are different in many significant respects.

(3) In comparing respondent with the other seven Inteflex students, it is seen that he was only one of two who was on academic warning at the time he sat for the NBME Part I. The other student presented acceptable extenuating circumstances (epileptic episode during the examination) to the faculty board; respondent did not.

(4) Nineteen other Inteflex students, many of whom had records better than respondent's, were dismissed by the faculty without ever having taken the NBME Part I. Respondent could likewise have been dismissed.

(5) Student were not "routinely" given two chances to pass the NBME Part I; instead, the practice was that every student who failed the exam was brought before the appropriate faculty board, reviewed, and voted upon. The other students were allowed a retest only by independent and separate action of the faculty board.

(6) Even if respondent's factual contention that petitioner failed to follow its own rule is taken as correct, the legal conclusion he urges is erroneous. This Court has recognized that a state university's failure to follow its own rules in dismissing a student for academic reasons does not amount to a constitutional violation. *Horowitz* at 92, n. 8.

In fairness to the Sixth Circuit, it must be said that the panel's re-

curiam), and that under Fed.R.Civ.P. 52(a) a district court's factual findings may not be set aside unless clearly erroneous, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982), its naked conclusion that the trial court's finding was "clearly erroneous", was improper.[19] Appendix D at 32a-33a; 742 F.2d at 915-916.

The net result of the Sixth Circuit's reversal below was to ground its analysis of respondent's substantive due process claim solely in contract. This contract analysis, while applicable to and correctly applied by the Sixth Circuit to respondent's demonstration that he had a property right so as to invoke the protection of § 1983 in the first instance, Appendix D at 30a-31a; 742 F.2d at 914-915, was errantly misplaced when applied to the wholly separate arbitrary and capricious component of any cause of action for violation of his substantive due process rights.[20] In resting its decision on such a

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view of the district court's decision was based on an incomplete transcript. Respondent did not order the court reporter to prepare a transcript of the closing argument, which was almost entirely devoted to a colloquy between Chief Judge Feikens and counsel for both sides as to the meaning of this Court's decision in *Horowitz*. Petitioner pointed out the absence of this crucial transcript in its brief to the Sixth Circuit. Unfortunately, the missing 90-page transcript was not filed by the court reporter until after the Sixth Circuit's decision herein, although before that court's denial of rehearing *en banc*.

[19] The district court's finding on this issue was made in the context of respondent's contract claim. Appendix C at 26a-27a; 559 F.Supp. at 800. The Sixth Circuit's reversal of that finding, however, was made in the context of respondent's substantive due process claim. Appendix D at 32a-33a; 742 F.2d at 915-916.

[20] The contractual right which comprised respondent's property interest was found by the Sixth Circuit to be "an implied understanding that a student shall not be arbitrarily dismissed from his university." Appendix D at 31a; 742 F.2d at 915. No finding was made that respondent had a property interest in being given a second chance to take the NBME Part I examination. Thus the Sixth Circuit's finding that respondent was entitled to such a second chance was based on the faulty premise that it was a protected right, and in *Stevens* v. *Hunt*, 646 F.2d

narrow ground, the Sixth Circuit failed to consider other factors which *Horowitz* implied were relevant to a proper assessment of the arbitrary and capricious component of respondent's cause of action. First, it ignored the totality of the circumstances essential to the faculty's decision to dismiss respondent. Second, it shunned the court's traditional deferential attitude toward academic decision-making.

In contrast, the Eighth Circuit, in *Hines* v. *Rinker*, 667 F.2d 699 (8th Cir. 1981), held that "[r]espect for the discretion of those best qualified to make such judgments dictates that the Medical School and not the federal courts should determine the qualifications of [a student] to continue his medical studies." *Id.* at 704. The medical student in *Hines* had argued that a failing course grade was the result of his reliance on a written course outline which purportedly allowed any student to receive an incomplete grade and subsequently make up the deficiency. The court rejected his narrow contention that such dismissal was arbitrary and capricious; the entire Medical School faculty had reviewed his grade and overall scholastically deficient academic record and agreed that his dismissal should not be overturned. Under the totality of the circumstances, the Eighth Circuit thought it proper to defer to the judgment of the faculty as to the student's overall qualifications to continue in his studies. *Ibid.*

The district court in *Watson*, *supra*, by requiring the plaintiff medical student to make a "clear and convincing showing" that his dismissal was arbitrary and capricious, *Id.* at 727, also recognized that deference to the university's academic decision was mandated. The student in *Watson*, like respondent here, based his claim on the school's Student Promotion and Evaluation Committee's record with respect to other students. The court rejected the student's claim that the different treatment

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1168, 1170 (6th Cir. 1981), another panel of the Sixth Circuit found, under comparable Tennessee law, that there was *no* property right in a medical student's expectation of a retest on the NBME examination.

received by those other students necessarily rendered the individual treatment he received arbitrary and capricious, since it was to be expected that the committee, in separately considering the entire academic records of the many different students, would afford those students separate and individual treatment. Since the plaintiff was unable to demonstrate that *any* other student in his situation under all the circumstances had received different treatment, the court held that his dismissal could not be said to be arbitrary and capricious.

In finding respondent at bar "qualified" before he took the NBME Part I, the Sixth Circuit wrongly assumed he was still qualified *after* he failed the examination and went on to regard him as a student *qualified* for a retest. Appendix D at 33a; 742 F.2d at 916. In reaching this conclusion, the Sixth Circuit began with a faulty premise and used it to construct a simplistic and inherently erroneous syllogism which it then substituted for the painstaking judgment of petitioner's medical faculty as to respondent's qualifications to continue in his studies. In so doing, it did not even allude to the unanimous decisions of those best trained and qualified to assess respondent's qualifications, or to the numerous academic factors on which their decision to dismiss him was based. By so myopically reviewing the petitioner's decision not to allow respondent a retest, the Sixth Circuit failed to heed this Court's repeated warnings against intruding into academic affairs.

These conflicts, with the guidance offered by this Court's decision in *Horowitz* and with other courts' interpretation of that decision, justify the grant of certiorari to review the correctness of the decision below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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January 29, 1985

APPENDIX A

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
ANN ARBOR

No. 82-60271

SCOTT E. EWING,

Plaintiff,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

Defendant.

Hon. John Feikens, Chief Judge

FINAL JUDGMENT

[Entered on December 4, 1984, pursuant to Opinion of the Sixth Circuit dated September 6, 1984]

This cause having come on by the mandate of the Court of Appeals for the Sixth Circuit issued on November 8, 1984 in *Ewing* v. *Board of Regents*, No. 83-1333, reported at 742 F.2d 913 (6th Cir. 1984), and plaintiff Scott E. Ewing having filed a motion for entry of a judgment order pursuant to the mandate and an application for an award of reasonable attorneys' fees and costs, and the parties having agreed as to the amount of such award,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT a final judgment be entered in favor of plaintiff Scott E. Ewing ("Ewing") and against defendant Regents of the University of Michigan (the "Regents") ordering the Regents to permit and sponsor Ewing to take the National Board of Medical Examiners (NBME) Part I examination, pursuant to the same terms and standards applicable to him in June 1981, at the regularly-scheduled session to be held in the month of September, 1986.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT, should Ewing on this basis achieve a passing score on the NBME Part I examination, the Regents reinstate Ewing in the Inteflex Program on the same basis as if he had passed the NBME Part I on the first occasion in June, 1981.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT Ewing, pursuant to 42 U.S.C. § 1988, is entitled to an award of reasonable attorneys' fees, disbursements and expenses to be paid by the Regents in the amount of $63,001.47 and therefore, judgment is entered in favor of Ewing and against the Regents for such attorneys fees, disbursements and expenses in the amount of $63,001.47, and that payment of such amount by the Regents is stayed until final disposition in the Supreme Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT this order shall not prevent the Regents from seeking Supreme Court review of the Sixth Circuit's opinion and orders or applying to this Court to extend the NBME examination date beyond September 1986, if the Supreme Court has accepted review of this case and has not rendered a decision by that date.

Enter: JOHN FEIKENS
U.S. District Judge

Agreed As To Form Only:

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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 82-60271

SCOTT E. EWING,

Plaintiff,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

Defendant.

MEMORANDUM OPINION

[Entered December 15, 1982, and reported at
552 F. Supp. 881 (E. D. Mich. 1982)]

Scott Ewing ("Ewing") challenges his dismissal from the University of Michigan Medical School. In his complaint, Ewing alleges that he was wrongfully dismissed in violation of his constitutional and contractual rights. He is seeking both injunctive relief and damages from the University of Michigan's Board of Regents ("the Board").

Defendant has moved to dismiss Count III of Ewing's complaint, which asks for monetary damages pursuant to 42 U.S.C. § 1983.[1] It urges: that the Board is immune from suit for

[1] Five other motions were pending in this case when defendant's motion to dismiss was heard. Defendant's motions were: to compel separate numbering of paragraphs in the complaint; for a more definite statement; and to strike. Plaintiff's motions were: for a preliminary injunction; and to overrule defendant's objections to interrogatories and document requests. At the hearing, it was agreed by the parties that plaintiff would redraft his complaint to respond to defendant's three motions just mentioned, and that the trial date for this case would be advanced so as to obviate the necessity of hearing plaintiff's motion for a preliminary injunction. It was also agreed that a stipluation would be entered with respect to the interrogatories and document requests found objectionable by defendant. Therefore, no further discussion on these motions is necessary.

monetary damages because of the Eleventh Amendment to the Constitution; and that the Board is not a "person" within the meaning of 42 U.S.C. § 1983. With regard to Eleventh Amendment immunity, Ewing counters that the Board is not a sovereign state entity within the meaning of the Eleventh Amendment, or, alternatively, that the Board has waived any Eleventh Amendment immunity it might have had. Ewing also maintains the Board is a "person" under § 1983. For the reasons stated herein, I grant defendant's motion to dismiss Count III of the complaint.

I.

In the absence of waiver, the Eleventh Amendment protects states from money judgments. *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945).

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Judicial interpretations have held the Amendment applicable to suits brought by a citizen against his own state. *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1973); *Hans* v. *Louisiana*, 134 U.S. 1 (1890). The Amendment has also been interpreted to

protect state instrumentalities and agencies from suit. *Edelman* v. *Jordan, supra; City of Detroit, et al.* v. *State of Michigan*, 543 F.Supp. 220 (E.D. Mich. 1982). Thus, if the University of Michigan is a state agency or instrumentality, it is entitled to claim immunity with respect to Count III of Ewing's complaint, provided it has not waived its right to do so.[2]

Whether a university is a state instrumentality under the Eleventh Amendment must be determined by considering the particular characteristics of the institution in question. *Long* v. *Richardson*, 525 F.2d 74 (6th Cir. 1975); *Soni* v. *Board of Trustees of University of Tennessee*, 513 F.2d 347 (6th Cir. 1975).[3] State court decisions may be given considerable weight in making this determination. *Long* v. *Richardson, supra*. Although the United States Court of Appeals for the Sixth Circuit has not yet ruled with respect to the University of Michigan, two judges of this District,[4] relying in part upon

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[2] If the University were merely a local governmental body, rather than a part of the state, then it would not be entitled to Eleventh Amendment immunity. *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 690 n. 54 (1978).

[3] In *Patsy* v. *Board of Regents of the University of Florida*, 50 U.S.L.W. 4731 (June 22, 1982), the Supreme Court noted that the question of Eleventh Amendment immunity involved interpreting state law and resolving state questions of fact. Ewing argues that because the Supreme Court has acknowledged the place of factual determination in deciding an Eleventh Amendment immunity question, I cannot dismiss Count III of his complaint without further fact finding. I disagree. Michigan's constitutional, statutory and case law provide me with all the information I need to decide the initial question of whether the University is a state instrumentality. With respect to waiver, discussed *infra*, Ewing has not suggested any facts which might alter my judgment on that issue.

[4] Judge Pratt so held in *Marwil* v. *Board of Regents, et al.*, Civil Action No. 79-73331 (E.D. Mich., July 3, 1980); Judge Guy has reached the same opinion in two cases: *Reiner* v. *Bidlack, et al.*, Civil Action No. 74-72922 (E.D. Mich., September 13, 1978); *Casad* v. *Regents of the University of Michigan*, Civil Action No. 80-74793 (E.D. Mich., July 30, 1982).

Michigan case authority, have held that the University is a state instrumentality entitled to Eleventh Amendment immunity. I agree with their conclusions.

The Board of Regents is at least colorably a state instrumentality by virtue of its constitutional mandate to supervise the University and manage its funds. Mich. Const. Art. 8 § 5. Although granted much independence in how it conducts university affairs, the Board is still subject to state audit, and must hold its formal meetings publicly. Mich. Const. Art. 8 § 4. The eight members of the Board are publicly elected officials. Art. 8 § 5. In analyzing the nature of the Board, Michigan courts have routinely held that it is "a department of the State government created by the Constitution to perform State functions." *Attorney General* v. *Burhans*, 304 Mich. 108, 111 (1942), *cited in Marwil* v. *Board of Regents, et al.*, Civil Action No. 79-73331 (E.D. Mich., July 3, 1980).

Apart from its constitutional origins, the University has another claim to being the "alter ego" of the state: it is fiscally tied to it. The Michigan Supreme Court has stated: "The property held by the Regents in their corporate capacity is the public property of the State held by the corporation in trust for the purposes to which it was devoted." *Auditor General* v. *Regents*, 83 Mich. 467, 469-470 (1890); *see also Lucking* v. *People*, 320 Mich. 495 (1948). Therefore, if a judgment diminishes the resources of the University, it immediately diminishes the resources of the state, which has an interest in the property.[5] Furthermore, Art. 8 § 4 of the Michigan Constitution provides, *inter alia*: "The legislature shall appropriate money to maintain the University of Michigan . . . [and] the legislature shall be given an annual accounting of all income and expenditures by [the University]." Thus, the legisla-

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[5] At least with respect to tort claims, the University is specifically subsumed under the state umbrella. Judgments against the University are to be paid by the state. M.C.L.A. §§ 691.1401, 600.6095.

ture has some responsibility for insuring the continued financial sustenance of the institution.[6]

Because the Board has been recognized as an independent branch of state government by the Michigan courts, and because the state is obligated to see that it has sufficient funds to survive, I hold that it is a state instrumentality within the meaning of the Eleventh Amendment.

II.

Ewing argues that even if the University is a state instrumentality within the meaning of the Eleventh Amendment, it has waived its sovereign immunity. I do not agree. The standard I am guided by in evaluating Ewing's contention of waiver was stated by the Supreme Court in *Edelman* v. *Jordan, supra*: "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' [Citation omitted]." *Id.* at 673.

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[6] *M.C.L.A.* 390.8 provides:

The university shall consist of at least 3 departments:

1. A department of literature, science and the arts;
2. A department of law;
3. A department of medicine; [and]
4. Such other departments . . . as the regents shall deem necessary, and the state of the university fund shall allow.

Although the level of state appropriations for the University is not set by any constitutional provision or statute, M.C.L.A. § 390.8 read against the background of Art. 8 § 4 of the Michigan Constitution is a starting point for determining the minimum funding obligation of the state. While certain departments of the University exist within the discretion of the Board and subject to fluctuating funding, the three departments mentioned in § 390.8 are to be preserved. If private support is lacking, it follows that the state must take up the slack to "maintain" the University.

Since *Edelman*, the Sixth Circuit has considered the question of whether Eleventh Amendment immunity has been waived by a state university sued under § 1983. In *Soni* v. *Board of Trustees of the University of Tennessee, supra,* the court held a statutory provision providing that the University of Tennessee could sue and be sued "in any court of law or equity" was a waiver of governmental immunity. Ewing would have me hold that an analogous clause which covers the University of Michigan and provides: "The board of regents shall constitute the body corporate, with the right as such of suing and being sued, of making and using a common seal, and altering the same." (§ 390.4) should be similarly construed. This interpretation is belied by two later Sixth Circuit cases. The "sue and be sued" clause at issue in *Martin* v. *University of Louisville*, 541 F.2d 1171 (6th Cir. 1976), provided that the university had the power to "sue and be sued, complain and defend, in its corporate name." *Id.* at 1174, *citing* Kentucky Revised Statutes, Section 273.172(2). Distinguishing *Soni* v. *Board of Trustees, supra,* the court held in *Martin* that a state's consent to suit in its own courts "does not necessarily imply its consent to suit in federal court." *Id.* at 1175. Unlike the "sue and be sued" statute in *Soni*, the statute in *Martin* did not provide for suit in "any court of law or equity"; therefore, no waiver of immunity in the federal courts was found. *See also Long* v. *Richardson*, 525 F.2d 74 (6th Cir. 1975). M.C.L.A. § 390.4 also lacks language providing for suit "in any court of law of equity." I cannot, therefore, find in M.C.L.A. § 390.4 the type of clearly expressed waiver of immunity in the federal courts that the Supreme Court and the Sixth Circuit have indicated must be present before waiver is established.

Ewing offers other arguments to support his position that the University has waived Eleventh Amendment immunity, but I find them similarly unconvincing. Ewing suggests that M.C.L.A. § 600.6440, part of Michigan's Court of Claims Act, must be read to establish waiver in the federal courts. Under

M.C.L.A. § 600.6419, the Court of Claims is established in Michigan as having exclusive jurisdiction over all claims against the state which are not excepted by § 600.6440. Section 600.6440 provides: *"No claimant may be permitted to file claim* in said court against the state nor any department, commission, board, institution, arm or agency thereof *who has an adequate remedy upon his claim in the federal courts . . . ."* (Emphasis added).

Admitting the possibility that some causes of action might appropriately be brought in federal court against the state is not the same as a general waiver of immunity from suit in the federal courts. As Judge Pratt observed in *Marwil* v. *Board of Regents, supra,* "The Michigan legislature merely determined that *where appropriate,* an exhaustion of federal court remedies would be required." *Id.* at 10. It is completely consistent with the Act to acknowledge a distinction between types of federal suit for which the state has waived immunity, and those for which it has not. The statute dictates an order of procedure *only* with respect to those cases for which federal amenability to suit has already been established.[7] *See also Copper S.S. Co.* v. *State of Michigan,* 194 F.2d 465 (6th Cir. 1952). Where no independent source of immunity is present, the plaintiff will not be allowed to bootstrap a waiver because of the Court of Claims Act.

Ewing's argument that the University's purchase of liability insurance is waiver of immunity is also unavailing. Merely purchasing such insurance does not constitute the type of knowing and clearly expressed waiver necessary to eliminate Eleventh Amendment immunity. *Branum* v. *Board of Regents*

[7] For example, suits brought against a state for attorney fees or back pay under Title VII of the Civil Rights Act of 1964 are properly cognizable in federal court. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976). Congress, acting pursuant to its Fourteenth Amendment § 5 enforcement power, has "overriden" the states' Eleventh Amendment immunity in such cases. It has not done so with respect to § 1983 suits. *Quern* v. *Jordan,* 440 U.S. 332 (1979).

of University of Michigan, 5 Mich.App. 134, 137 (1966). Furthermore, M.C.L.A. § 691.1409 specifically provides: ". . . The existence of any policy of insurance indemnifying any governmental agency against liability for damage is not a waiver of any defense otherwise available to the governmental agency in defense of the claim."

Finally, Ewing's insistence that there may be facts which indicate a waiver in this particular case does not impress me. Ewing has alleged no such facts. I recognize that a waiver may occur by conduct of the parties, as the Supreme Court implicitly found in *Toll, President, University of Maryland* v. *Moreno,* 50 U.S.L.W. 4880 (June 28, 1982), but this theoretical possibility does not deter my granting defendant's motion under the circumstances of this case.

III.

Because I have held that the University is a state instrumentality entitled to Eleventh Amendment immunity which it has not waived, I need not reach the question of whether it is a "person" for purposes of 42 U.S.C. § 1983. Whether or not it is a "person," the University is immune from money damages.

An order consistent with this opinion is entered herewith.

/s/ JOHN FEIKENS
Chief United States District Judge

Dated: December 15, 1982.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 82-60271

SCOTT E. EWING,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant.

OPINION

[Entered March 22, 1983, and reported at 559 F. Supp. 791 (E. D. Mich. 1983)]

I.

Plaintiff, Scott E. Ewing (Ewing), was admitted as a student to the Inteflex program at the University of Michigan in the fall semester 1975; his purpose — to become a medical doctor. This six (6) year program is governed by a University Policy Committee with the Literature, Science and Arts College responsible for the curriculum awarding the B.A. (B.S.) degree and the Medical School responsible for the curriculum awarding the M.D. degree (Defendant's Exhibit 1).

The program is planned to educate individuals whose academic ability, based on high school grades and test scores, is on the same level as those who qualify for admission to the Medical School. The program runs on a ten-month academic

year for the first four years. The first year preceptorship is usually over by the middle of June, but in the subsequent two years, spring half-term classes meet until the end of June. The fourth year classroom courses end in early May, allowing students to prepare for Part I of the National Board of Medical Examiners (NBME) given in mid-June. A three-week basic clerkship begins in early July, after which the Inteflex student enters the Medical School's clinical phase which ends in the spring of the sixth year with the award of the M.D. degree (Defendant's Exhibit 1, page 4).

In this case, Ewing seeks an order compelling the defendants to permit him to retake Part I of the NBME. He does so because after he failed that examination, he was dismissed from the Inteflex program.

A.

In the fall of 1975, when Ewing enrolled in the program, he encountered immediate difficulty in handling the work and he did not take the final examination in Biology. It was not until the following semester that he completed this course and received a C. His performance in his other first semester courses was as follows: a C in Chemistry 120, a C in his writing course, and an incomplete in the Freshman Seminar. In the next semester he took Chemistry 220, a Freshman Seminar, and Psychology 504. He received a B in the Freshman Seminar, a C in Chemistry 220, but he withdrew from Psychology 504. He was advised at that time that he could not take the Patient Care course, usually given during the fall of an Inteflex student's second year, and he was placed on an irregular program. Because of these difficulties, at the July 14, 1976 meeting of the Promotion and Review Board he requested a leave of absence, and when this was approved, he left the program.

During the summer of 1976 while on leave, he took two Physics courses at Point Loma College in California. He reentered the Inteflex program at the University of Michigan in

the winter 1977 term. In that term he repeated Chemistry 220 in which he received an A–. In the spring of 1977, he passed the Introduction to the Patient Care course.

In the 1977-78 year, he completed the regular Year II program. But then he encountered new difficulty. In the fall of 1978 he received an incomplete in Clinical Studies 400, which was converted to a Pass; a B in Microbiology 420; and an incomplete in Gross Anatomy 507. The Gross Anatomy incomplete was converted to a C– by a make-up examination. During the winter of 1979 he received a C– in Genetics 505, a C in Microbiology 520, an E in Microanatomy and General Pathology 506, a B in Creative Writing, and a Pass in Clinical Studies 410. He appealed the Microanatomy and General Pathology grade, requesting a change from an E to a D, and a make-up exam to receive a Pass. His appeal was denied by the Grade Appeal Committee, and he was again placed on an irregular program; he took only the Clinical Studies 420 course in the spring 1979 semester.

In July 1979, Ewing submitted a request to the Promotion and Review Board for an irregular program consisting of a course in Pharmacology in the fall and winter 1979-80 and a course in Human Illness and Neuroscience in 1980-81, thus splitting the fourth year into two years. The Board denied this request and directed him to take the fourth year curriculum in one academic year. He undertook to do so. He removed his deficiency in Microanatomy and General Pathology 506 by repeating the course during the winter 1980 semester and received a C+. In the spring term of 1980 he passed Developmental Anatomy with a B– grade, and he received a C grade in Neuroscience I 509 after a reexamination. In the fall of 1980, he received a passing grade in Neuroscience 609 and Pharmacology 626, and in the winter term of 1981, he received a passing grade in Clinical Studies 510 and a deficiency in Pharmacology 627. He was given a make-up examination in this course, and he received a 67.7 grade.

He then took Part I of the NBME (National Board of Medical Examiners) examination. The NBME examination is administered by the Board of Medical Examiners, a proprietary organization which devises tests for licensure. Part I of the NBME examination must be passed before a student in the Medical School can reach the clinical stage of the program. Both regular medical students (known also as standard students) and students in the Inteflex program are required to take Part I of the NBME examination before continuing with clinical studies. Ewing received a score of 235; a score of 345 was required for a passing grade. His 235 score was not only the lowest score in his class, but the lowest score ever recorded by a University of Michigan student in the Part I examination. Because of this, on July 24, 1981, the Promotion and Review Board voted unanimously to drop him from registration in the program, noting that he had been earlier advised that any future deficiency would lead to dismissal.

On August 27, 1981, Ewing appealed the decision of the Promotion and Review Board to the Executive Committee. That Committee, having reviewed the record and having discussed the issues with Ewing and his representatives, Drs. Anderson and Shott, again unanimously affirmed the action of the Promotion and Review Board. It did so by approving a motion to deny Ewing's appeal for a request for a leave of absence status so that he could retake Part I of the NBME examination.

B.

The evidence indicates that since this NBME board program was instituted, thirty-two standard students in the Medical School who failed Part I of the NBME were permitted to retake the test. Of these thirty-two students, ten were allowed to take the test a third time, and one a fourth time. It also appears that seven students in the Inteflex program were allowed to retake the test, and one student was allowed to retake

it twice. Ewing is the only student who, having failed the test, was not permitted to retake it.

Dr. Robert E. Reed, a former Director of the Inteflex program, and a member of the Promotion and Review Board, stated that students were routinely given a second chance absent other circumstances. It is because of this claimed disparity between Ewing and other students that Ewing argues that the decision of the defendants is arbitrary and capricious, and thus a violation of his substantive due process rights.

C.

Ewing was born in 1956. He graduated from high school in British Columbia in 1974 and, before entering the Inteflex program in the fall of 1975, he traveled somewhat and was also gainfully employed. In his application to the Inteflex program, he wrote:

> I should be considered because of my personal and academic accomplishments which I feel demonstrate my suitability to the study of medicine. . . . The academic aspects of medicine are particularly appealing to me. I decided to apply to your integrated pre-medical-medical program because of its unique emphasis on communication skills and the social problems of health care.

Yet, on March 8, 1976, his file reveals that Dr. Reed wrote to the Inteflex counseling staff, saying:

> [Ewing's] record this past fall was deficient enough that he initially came to the attention of the Literary School's Administrative Board, although they accepted his appeal and allowed him to register for the winter term.

Later in 1976, Ewing was advised of the Interim Board's concern with his poor performance. A note in his record on May 7, 1976 states:

> The way he has been behaving is viewed as much more alarming than the student is willing to admit to.

Because of this, he was given a leave of absence for the ensuing year. In a letter to the Board concerning this, he writes about the possibility of going to another school that "might be just the thing to rescue me from the throes of academic lethargy."

D.

Earlier I commented on Ewing's academic difficulties. It is significant that it took him three years to complete the first two years of the program. It is also apparent that he had great difficulty in the "hard" science courses. It was directly as a result of having received an E in Microanatomy and General Pathology that he was placed on academic probation. He countered this with a request that he be put on an irregular program so as to lighten the load, and it is noteworthy that the Promotion and Review Board at this stage advised him that he could no longer cope by doing reduced work.

On July 30, 1980, Dr. Reed advised Ewing that because of his poor performance in Neuroscience 509, he had to take a reexamination. Dr. Reed wrote:

> The Board was concerned that this may be an indication that the problems that previously led to your irregular schedule and difficulty in completing course work might be returning. The Board wishes to note these concerns to you and to remind you that any further deficiencies in the Program would be grounds for dismissal from registration.

In the winter of 1981, he received a Deficiency in Pharmacology, indicating that he was still having difficulty mastering his work. By the end of the winter 1981 semester, he had been in the Inteflex program six years, and he had only completed Phase I and Phase II (four years of the program).

Ewing's discussion of his problems with the Promotion and Review Board on July 31, 1981 is also significant. The minutes note that Ewing reviewed the events of the previous year.

He noted that his mother's heart attack in the spring of 1980 had been a disrupting influence during the summer and early fall but that in spite of that he had performed satisfactorily throughout the fall term in what he described as the most difficult term in the curriculum. However, early in the winter term a 5½ year close relationship with his girl friend ended. Scott described this as having a greater negative effect on him than it should have primarily due to the length and closeness of the relationship and the fact that he had changed classes twice and therefore did not have the close relationship with classmates that other Inteflex students had who stayed with their classes.

He also noted that he had spent a great deal of time preparing a paper for the Hopwood Essay contest. He circulated this 100-page paper among the Board members for review. Mr. Ewing stated that in retrospect he should not have devoted this much time to his writing but that he felt a commitment to his instructor who had encouraged his work. Scott said that the work on the paper and his personal crisis had caused him to get behind in his work in Human Illness and Pharmacology and that he was only beginning to recover by the end of the year. He cited his passing scores on the last examinations in Human Illness and Pharmacology as evidence that his performance was improving. He stated that the requirement for a make-up examination in Pharmacology was a great shock to him and that he was under a great deal of pressure because of the previous Board stipulations regarding further deficiencies. After successfully completing the Pharmacology make-up examination he only had ten days to prepare for the Boards. His background, the fact that he was further away from the basic medical science courses than other Inteflex students and the pressure to achieve made it very difficult for him to achieve a passing score. While taking the exam he realized that while the terminology was familiar to him, he was not prepared to pass it and a certain amount of "panic" set

in which he believes made his score even lower than it would have been without this pressure.

Mr. Ewing reminded the Board of the time and effort he had already invested in the Program and his deep desire for a career in medicine. He cited the excellent clinical work that he has done circulating a patient work-up he had prepared in the Clinical Studies 400 course which had been described as excellent by Dr. Faith Fitzgerald and a recent paper prepared during his clerkship. These plus his honors grade in the Introductory Clerkship, Mr. Ewing said, was evidence of the level of clinical work of which he was capable. He asked for a second chance at the National Board test with adequate time to prepare.

Several of the Board members then asked Mr. Ewing questions. Dr. Murphy noted that a number of students in the Program have had very severe personal crisis in their personal lives which had not affected their work to the degree that had Scott's and wondered why this had had such an impact on him. Mr. Ewing replied that the long-term nature of the relationship and the fact that he had changed classes twice in the Program made his situation somewhat unique. Dr. Gershowitz noted that there were numerous instances in Mr. Ewing's record of having incompletes and make-up examinations to achieve a passing grade. He expressed concern that this pattern seemed to be continuing up to the present. Mr. Ewing agreed that this had been a pattern and he explained that it might be due to a lack of maturity, but stressed the fact that he had learned a great deal during this past year about himself and felt that the previous tendency to put things off and not be well prepared was now past him.

Dr. Friedman asked if Mr. Ewing had been aware of the meaning of the letters that he had received which advised him that further deficiencies would lead to his being dropped from the Program or would be grounds for dismissal from the Program. Mr. Ewing said he was well aware of what those meant and in fact this had led to his being "under the gun" during his last two years in the

Program. He reiterated that this may have been one factor in his low performance on the National Board examination because he realized the critical importance of passing. (emphasis added).

There being no further questions, Mr. Ewing summarized his situation by reviewing the particular reasons for his poor performance during the past term, the evidence from his work of his ability to perform at the clinical level and his strong desire to continue toward a career in medicine.

Even after Ewing had been dropped from the program, the faculty offered to permit him to make a "shelf examination." This is an examination in which the faculty administers Part I of the NBME examination and the results can be used to make an application to another medical school; the results *cannot* be used for readmission to the University's Inteflex program. Ewing did not take this "shelf exam."

II.

Ewing claims a violation of his substantive due process rights. In an amended complaint he claims that he is denied a protectible property interest in not being able to retake Part I of the NBME test and that this action on the part of defendants is arbitrary and capricious, primarily because while other students were allowed to retake the examination, he was not permitted to do so. He claims also that this decision is contrary to medical school accepted practice. He asks that he be reinstated as a student in good standing in the Inteflex program if, being permitted to take a reexamination of the Part I NBME test, he achieves a passing score. In Count II he alleges a contractual relationship with the University which he claims is materially breached in that he was dismissed after a single failure of the NBME Part I examination. In Count IV he sets up a claim of promissory estoppel. Count III has heretofore been dismissed by me since it seeks damages against the State contrary to the prohibitions of the Eleventh Amendment.

III.

The basic issue is whether and to what extent academic decisions as to the qualifications of a medical student are subject to substantive due process review in this court.

The starting point of this inquiry is the United States Supreme Court's decision in *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978), in which the plurality opinion states:

> [In regard to substantive review] a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if "shown to be clearly arbitrary or capricious." *Mahavongsanan* v. *Hall*, 529 F.2d at 449. *See Gaspar* v. *Bruton*, 513 F.2d at 850, and citations therein. Even assuming that the courts can review under such a standard an academic decision of a public educational institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case [footnote omitted]. Courts are particularly ill-equipped to evaluate academic performance. The factors discussed [above] with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decisionmaking [footnote omitted].

Id. at 91-92.

Horowitz did not directly settle the question whether courts can review academic qualification decisions on substantive due process grounds. Some lower courts have dealt with this uncertainty by finding on the facts that, even if such review is permitted, the claim of arbitrary or capricious action on the part of a medical faculty was not proven. For example, in *Stevens* v. *Hunt*, 646 F.2d 1168 (6th Cir. 1981), the United States Court of Appeals for the Sixth Circuit was required to decide whether the dismissal of a number of students from medical school was arbitrary or capricious, and stated:

> The *Horowitz* decision still leaves open the question

as to whether such a cause of action exists. Even if a cause of action does exist, it is clear, however, that arbitrary and capricious action on the part of the University officials would be a necessary element in order for plaintiffs to prevail. *Board of Curators* v. *Horowitz*, 435 U.S. 78, 91, 98 S.Ct. 948, 955, 55 L.Ed.2d 124 (1978).

> In order to establish such arbitrary and capricious action, the plaintiffs must show that there is no rational basis for the University's decision, *Greenhill* v. *Bailey*, 519 F.2d 5; *Horowitz* v. *Board of Curators*, 447 F.Supp. 1102 (D.C.Mo. 1975) or that the decision to dismiss was motivated by bad faith or ill will unrelated to academic performance. *Garpar* v. *Burton*, 513 F.2d 843.

Id. at 1170. The Court went on to hold that "[I]t cannot say that the dismissals were arbitrary and capricious. Therefore, the decision of the district court is affirmed." *Id.* The United States Court of Appeals for the Eighth Circuit disposed of a similar claim in identical fashion in *Hines* v. *Rinker*, 667 F.2d 699 (8th Cir. 1981).

Other post-*Horowitz* decisions have either tacitly or expressly concluded that *Horowitz* does allow such substantive review. *Dietz* v. *Amerian Dental Ass'n*, 479 F.Supp. 554 (E.D.Mi. 1979); *Aubuchon* v. *Olsen*, 467 F. Supp. 568 (E.D. Mo. 1979); *Watson* v. *University of South Alabama College of Medicine*, 463 F.Supp. 720 (S.D.Ala. 1979); *Bleicker* v. *Board of Trustees of the Ohio State University, College of Veterinary Medicine*, 485 F.Supp. 1381 (S.D.Oh. 1980). A recent Fifth Circuit decision not only allowed such review, but found that the academic decision in question was arbitrary and capricious in that it required students to be tested on materials which they had not been adequately taught. *Debra P.* v. *Turlington*, 644 F.2d 397 (5th Cir. 1981).[1]

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[1] *Debra P.* is not directly analagous to either *Horowitz* or this case in that it concerned academic decisions made by the state legislature and applied to high school students.

In determining the proper scope of substantive review of decisions involving academic qualification, I must consider the traditional relationship between courts and schools. In this relationship courts have usually adopted a "hands-off" posture. In commenting on the relationship between courts and medical schools, *Connelly* v. *University of Vermont*, 244 F. Supp. 156 (D.Vt. 1965), states:

> [I]n matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals.
>
> . . . .
>
> A medical school must be the judge of the qualifications of its students to be granted a degree; Courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine.

Id. at 160-161. Similarly, the court in *Keys* v. *Sawyer*, 353 F.Supp. 936 (S.D.Tex. 1973), states:

> University officials should have broad discretionary power to determine the fitness of a student to continue his studies. There is a compelling need and very strong policy consideration in favor of giving local school officials the widest possible latitude in the management of school affairs.

Id. at 940.

Horowitz demonstrates the continuing vitality of this hands-off approach in warning against judicial intrusions into such areas. 435 U.S. at 92. Additionally, Justice Powell's concurrence in *Horowitz* recognized that:

> University faculties must have the widest range of discretion in making judgments as to the academic per-

> formance of students and their entitlement to promotion or graduation.

435 U.S. at 96. n.6.

This is not to say that decisions as to academic qualification are not subject to substantive due process review. Throughout this century this constitutional requirement has constantly been interpreted as requiring both procedural and substantive compliance. *Kelley* v. *Johnson*, 425 U.S. 238 (1976). So long as protected interests (life, liberty or property) are implicated, the Constitution mandates that due process, including all of its component parts, be accorded.

Traditional substantive due process review requires a court to scrutinize an action which may result in the deprivation of a protected right and strike it down if it is found to be arbitrary or capricious. This requirement is not so rigid, however, as to mandate the same scope and depth of review in every situation. Due process has proved to be an extremely flexible concept when applied to educational decisionmaking. In its common application, procedural due process normally requires notice and a hearing prior to the deprivation of a protected interest. In school disciplinary actions, the Supreme Court has held that all that it required is an informal "give and take" in which the student is provided with notice along with some opportunity to present his or her side of the story. *Goss* v. *Lopez*, 419 U.S. 565 (1975). Moreover, in the case of dismissals because of a lack of academic qualification, the Supreme Court has held that procedural due process may require nothing more than prior notice. *Horowitz, supra.*

This same flexibility applies *a fortiori* to substantive due process areas. *Horowitz* clearly expresses the view that traditional substantive due process review is inappropriate in academic qualification decisions, saying that courts are ". . . particularly ill-equipped to evaluate academic performance." 435 U.S. at 92.

Thus I conclude that the substantive due process review applicable to cases involving academic qualification decisions

only allows me to scrutinize the objective factors which may have tainted or otherwise affected the decision, and not the propriety of the decision itself. Having concluded this, I could appropriately review whether such a decision was "motivated by bad faith or ill will unrelated to academic performance." *Stevens*, 646 F.2d at 1170. Likewise, I could also review whether the decision was based on arbitrary or capricious factors which are not reasonably considered to be academic criteria. But, I am not permitted to review the ultimate academic qualification decision which has been made in a "careful and deliberate" manner, *Horowitz*, 435 U.S. at 85, and not influenced by ill will or ulterior purposes. Put another way, if all that went into the academic qualification decision complied with substantive due process, this would constitute per se proof that the decision reached is in accord with substantive due process. I thus will not and cannot examine, in any manner, the decision itself.

Such a rule is supported by *Horowitz's* admonition and warning against the use of traditional substantive due process review. This rule is also supported by direct precedent. In *Gaspar* v. *Burton*, 513 F.2d 843 (10th Cir. 1975), the court stated:

> The courts are not equipped to review academic records based upon academic standards within the particular knowledge, experience and expertise of academicians. Thus, when presented with a challenge that the school authorities suspended or dismissed a student for failure re academic standards, the court may grant relief, as a practical matter, only in those cases where the student presents positive evidence of ill will or bad motive.

Id. at 851.

This type of limited review represents the only practical and workable judicial approach to academic qualification decisionmaking. While courts may be loath to step in and regrade an essay exam or evaluate the merit of a curriculum, such a re-

view, however ill-advised, could be accomplished. But in certain areas, such as the evaluation of the clinical performance of a medical student, courts are completely unable to afford review in that the evidence of the performance, the student's actual functioning in a clinical experience, can no longer be directly observed and evaluated. Thus, it is for prudential as well as pragmatic reasons that the propriety of academic decisions cannot be reviewed.

Such limited review will protect the interests of educators as well as those of students. It will afford colleges, school boards, and teachers the traditional broad range of autonomy which they need in order to tend to the business of education. At the same time it will protect the student from actions which are tainted by any arbitrary and capricious non-academic considerations.

Accordingly, I find that defendants did not act in violation of Ewing's due process rights. There have been no allegations offered to the effect that defendants' decision was based on bad faith, ill will or other impermissible ulterior motives. The evidence demonstrates that the decision to dismiss plaintiff was reached in a fair and impartial manner, and only after careful and deliberate consideration.

To leave no conjecture as to my decision, even under a traditional substantive due process review, I find that the evidence demonstrates no arbitrary or capricious action since the defendants had good reason to dismiss Ewing from the program.

I also reject the contract and promissory estoppel claims, finding no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination. Ewing contends that the pamphlet "On Becoming A Doctor," which states that a qualified student would be given a second chance to take the NBME, gives him a contractual right to do so. Even if he had learned of the pamphlet's contents before he took the examination, and I find

that he did not, I would not conclude that this amounted either to an unqualified promise to him or gave him a contract right to retake the examination.

Accordingly, I find in favor of the defendants and against the plaintiff on all counts. An appropriate order may be entered.

/s/ JOHN FEIKENS
Chief United States District Judge

Dated: March 22, 1983

APPENDIX D

No. 83-1333

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCOTT E. EWING,

Plaintiff-Appellant.

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed September 6, 1984.
[Reported at 742 F.2d 913 (6th Cir. 1984)]

Before: KEITH, Circuit Judge; PECK, Senior Circuit Judge; and NEESE, Senior District Judge.*

KEITH, Circuit Judge. This is an appeal by the plaintiff, Scott E. Ewing, from a reported decision of the United States District Court for the Eastern District of Michigan finding in favor of the defendant, the Board of Regents of the Uni-

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* Honorable C. G. Neese, Senior Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

versity of Michigan, 559 F. Supp. 791 (E.D. Mich. 1983). In the district court the plaintiff had sought an order to compel the defendant to allow him to retake the National Board of Medical Examiners' Part I Examination. For the reasons stated below, the decision of the district court is reversed and remanded with instructions that an appropriate order be entered consistent with this opinion.

In 1981, Ewing was enrolled as a student in the University of Michigan's six-year program of combined undergraduate and medical education, known as the Inteflex Program. Ewing sat for and failed the National Board of Medical Examiners' Part I Examination (NBME Part I) in June 1981. Because of his failure of the NBME Part I, Ewing was dismissed from the Inteflex Program. Ewing prosecuted two administrative appeals of the decision to dismiss him. Both appeals were denied as the Inteflex Phase II Promotions and Review Board and the Executive Committee of the Medical School determined to affirm the decision to terminate his registration.

Ewing filed suit in the United States District Court for the Eastern District of Michigan, seeking an injunction that would require the Board to permit him to take the NBME Part I again and, if he passed, to reinstate him with the same status as if he had passed on the first occasion. Ewing's amended complaint asserted claims based upon: (1) the violation under color of state law of his substantive due process rights, which is actionable under 42 U.S.C. § 1983 (Count I); (2) breach of contract (Count II) and (3) the principles of promissory estoppel (Count IV).[1] A nonjury trial of Counts I, II and IV was held in the district court in Ann Arbor, Michigan, with the Honorable Chief Judge John Feikens presiding, on

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[1] Count III seeking monetary damages pursuant to 42 U.S.C. § 1983 was dismissed by the district court, prior to trial, based upon immunity conveyed to the Board under the 11th amendment to the United States Constitution. 552 F.Supp. 881 (E.D. Mich. 1982). Ewing did not appeal the dismissal of his claim for monetary damages.

January 10-12 and 14, 1983. The district court filed an opinion on March 22, 1983, denying each of Ewing's claims and directing that an appropriate order be submitted. 559 F. Supp. 791 (E.D. Mich. 1983). Based upon that opinion, the district court entered judgment in favor of the Board on April 11, 1983, and this appeal followed.[2]

It is well settled that in order to prevail in a Section 1983 action, the plaintiff has the burden of showing that he was deprived of a constitutional right and that the deprivation occurred under color of state law. *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 155-56 (1978). It is not disputed that the defendants were acting under color of state law. *Ewing* v. *Board of Regents of the University of Michigan*, 552 F. Supp. 881, 883 (E.D. Mich. 1982). The issue then, with respect to the Section 1983 claim, is whether Ewing was deprived of a constitutionally cognizable right.

The United States Supreme Court has held that property interests, which may give rise to constitutional protections, are created and defined by existing rules or understandings which stem from independent sources, such as state law. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972). The Court has also held that these property interests can arise from explicit contractual provisions or "other agreements implied from the promissor's words or conduct in light of the surrounding circumstances." *Perry* v. *Sindermann*, 408 U.S. 593, 601-02 (1972).

In an old racial discrimination case, *Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909), the Michigan Supreme Court discussed the contractual aspects of the relationship between a medical student and his institution. Although, the explicit holding of *Booker* has

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[2] Because we believe this case can be disposed of on the Section 1983 claim, this Court does not expressly reach the breach of contract or promissory estoppel claims.

since been discredited, the view of the Michigan High Court on the contractual relationship issue is instructive:

> In fact, when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom. The required fees may be paid annually, and may be no more than fair fees for the advantages received by the student during the year, and yet it is clear that the fees for the first year are, in fact, paid and received with the understanding that the work of the year will not be made fruitless, a graduation and a degree made impossible, by an arbitrary refusal to permit further attendance. . . . There is no good reason why the law should not recognize, as growing out of these relations, a right of realtors resting in contract to be continued as students by the respondent.

156 Mich. at 99-100.

Other circuit courts have also agreed in the contractual nature of the relationship between a student and his university. *See, e.g., Corso* v. *Creighton University*, 731 F.2d 529, 531 (8th Cir. 1984); *Williams* v. *Howard University*, 528 F.2d 658, 660 (D.C. Cir.), *cert. denied*, 429 U.S. 850 (1976). Thus, we hold that an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections.

In *Stevens* v. *Hunt*, 646 F.2d 1168 (6th Cir. 1981), this Court discussed the possibility that a university student may have a cause of action for the violation of substantive due process rights arising out of an academic dismissal from a university. In *Stevens*, this Court referred to the United States Supreme Court's decision in *Board of Curators* v. *Horowitz*, 435 U.S. 78 (1978), and said:

> The *Horowitz* decision still leaves open the question as to whether such a cause of action exists. Even if a cause of action does exist, it is clear, however, that arbitrary

> and capricious action on the part of the University officials would be a necessary element in order for plaintiffs to prevail.
>
> In order to establish such arbitrary and capricious action, the plaintiffs must show that there is no rational basis for the University's decision, or that the decision to dismiss was motivated by bad faith or ill will unrelated to academic performance.

646 F.2d at 1170 (citations omitted). Pursuant to the guidance provided by *Stevens*, we hold that the arbitrary and capricious deprivation of a constitutionally cognizable right does state a valid case of action.

In the case at bar, the University of Michigan argues, in essence, that even if there were a contractual relationship between the parties, their action in dismissing Ewing is not arbitrary and capricious because the terms of any such contract would be defined solely by the University of Michigan Medical School Bulletin. This bulletin notes the broad discretionary power of the Promotion and Review Board. *See* Appellee's Brief at 25-27 (quoting from the University of Michigan Medical School Bulletin, 1975-77 ed. at 34; 1977-79 ed. at 36). This limited view of the terms of the contractual relationship between the parties ignores, however, substantial and uncontroverted evidence in the trial record that at the time Ewing took the NBME Part I, medical students were routinely given a second opportunity to pass it. Joint Appendix at 157-58. In fact, the evidence is undisputed that between 1975 and 1982, of the forty medical students who failed the NBME Part I on the first attempt, every one of these students was allowed a reexamination except Ewing. Joint Appendix at 110-11.

In light of this undisputed evidence of a consistent pattern of conduct, the finding of the district court that there was not "sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct

to give Ewing a second chance to take Part I of the NBME examination," 559 F. Supp. at 800, is clearly erroneous. A University promotional pamphlet entitled "On Becoming a Doctor", stated that a qualified student would be given a second chance to take the NBME. This University publication is important because, irrespective of whether Ewing saw this pamphlet before taking the NBME Part I, this pamphlet memorialized the consistent practice of the medical school with respect to students who initially fail that examination.

There is substantial evidence in the record, and there is no district court finding to the contrary, that Ewing was a "qualified" student, as the University defined that term, at the time he sat for the NBME Part I. Joint Appendix at 298, 299. The evidence plainly demonstrates that the University treated Ewing in an arbitrary and capricious manner by not allowing him a second opportunity to take Part I of the NBME.

In sum, the evidence demonstrates that it was the consistent practice of the University of Michigan to allow a qualified medical student who initially failed the NBME Part I an opportunity for a retest. The evidence demonstrates that at the time Ewing sat for the NBME Part I he was a qualified student. The evidence also demonstrates that Ewing was the only University of Michigan medical student who initially failed the NBME Part I between 1975 and 1982, and was not allowed an opportunity for a retest. This action by the University of Michigan was arbitrary and capricious and must be reversed.

Accordingly, the decision of the district court is reversed and remanded with instructions that an order be issued compelling the University to allow Ewing to retake the NBME Part I. Further, should Ewing pass the NBME Part I, the district court is instructed to order that Ewing's registration in the Inteflex Program be reinstated.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-1333

[Filed September 6, 1984, John P. Hehman, Clerk]

SCOTT E. EWING,
Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Defendant-Appellee.

Before: KEITH, Circuit Judge; PECK, Senior Circuit Judge; and NEESE, Senior District Judge.

JUDGMENT

ON APPEAL from the United Sates District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded consistent with this opinion.

It is further ordered that Plaintiff-Appellant recover from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk

Issued as Mandate: November 8, 1984

APPENDIX F

83-1333

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed October 31, 1984]

SCOTT E. EWING,
Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Defendant-Appellee.

ORDER DENYING PETITION FOR REHEARING EN BANC

Before: Keith, Peck and Neese

A majority of the Court having not favored rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, the Court concludes that the petition for rehearing is without merit. Accordingly, it is ORDERED that rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk

(2)

Office-Supreme Court, U.S.
FILED
MAR 4 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1273

In The
Supreme Court of the United States
October Term, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,
v.
SCOTT E. EWING,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the petition raise any substantial Eleventh Amendment issue regarding the grant of prospective injunctive relief against Regents for violation of federal law, where the complaint characterized the defendant only as the Board of Regents of the University of Michigan, but Regents represented to the District Court that the Eleventh Amendment was no bar to injunctive relief (citing authorities in which injunctions were entered against officials in their official capacities), the case was tried on the merits on that basis, and pleading defects, if any, in not naming the individual Regents in their official capacities can be remedied by amendment pursuant to F.R.C.P. 15 (b) and *Brandon v. Holt*?

2. Is Regents' assertion of the Eleventh Amendment in their petition barred by waiver, since Regents explicitly represented to the District Court that the Eleventh Amendment was inoperative as to injunctive relief, the issue was not raised in the appeal on the merits, and the rehearing petition in the court of appeals raised the issue only on the grounds that the injunction granted retroactive relief, an issue not pursued in the petition?

3. Did the Court of Appeals correctly apply the stringent arbitrary and capricious standard for determining a violation of substantive due process rights by Regents, when such standard has been consistently applied by other courts?

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COUNTERSTATEMENT OF THE CASE[1]

A. *The Medical School's Inteflex Program.*

Respondent Scott E. Ewing ("Ewing") enrolled in 1975 in a six-year program of study offered jointly by the University of Michigan's medical school and undergraduate college known as the Inteflex Program. Inteflex students earn both the baccalaureate and the M.D. degrees. (Tr. II at 113; Tr. I at 25-26). The Inteflex Program accepts annually 50 students after high school and exposes them to a combined curriculum of undergraduate and medical courses, including a medical clerkship, without requiring the students to reapply to medical school after completing their undergraduate studies. (Tr. I at 26-27).

In addition to the medical students in the Inteflex Program, the University of Michigan Medical School also

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[1]Ewing has filed a counterstatement of the case since the "Statement of Relevant Facts," by the Regents of the University of Michigan ("Regents") (Petition at 3-9) contains a number of assertions unsupported by the record. For example, Regents state that "[Ewing] further admitted that he had been fully . . . aware when he took the NBME . . . that if he failed he could be dropped from registration." (Petition at 8). Cited in support are a reference (Tr. III at 273) to the testimony of Dr. Friedman, a faculty member, and the minutes of the Promotion and Review Board's July 31, 1981, meeting (DX 10), at which Ewing allegedly made this admission. What is not disclosed, however, is that on recross-examination Dr. Friedman disavowed his earlier testimony and conceded that Ewing had neither said nor even implied that he had been aware a single failure of the NBME Part I could lead to his dismissal. (Tr. III at 295). Dr. Friedman's corrected testimony comports with Ewing's own testimony on the inaccuracy of the comments attributed to him in DX 10. (Tr. III at 63-64). Indeed, Ewing contested the accuracy of these minutes as soon as he obtained a copy of them in August 1981. (DX 22). Equally important, Ewing challenged on appeal the admissibility of DX 10 under the Federal Rules of Evidence (Brief at 39-41; Reply Brief at 27-30), but the Court of Appeals did not reach the issue.

admits students who have already earned their undergraduate degrees into a four-year, traditional medical school program (hereinafter "Standard Program"). (Tr. I at 27). Both Inteflex and Standard students earn the same medical degree. (Tr. I at 27).

The Inteflex Program is divided into three two-year phases. (Tr. I at 146; PX 2 at 12-14). Phase I, the first two years, consists predominately of premedical courses, with some medical courses during the last semester. (Tr. I at 146; Tr. II at 115). Ewing successfully completed Phase I in the prescribed two years of registration. (Tr. II at 115-17).

Phase II of the Inteflex Program entails study predominately in the basic medical sciences. (Tr. I at 146). Students in the Standard Program in their first two years take medical courses covering the same general subject matter as Inteflex students take during Phase II. (Tr. I at 122-26). Ewing successfully passed all of these required courses in Phase II of the Inteflex Program. (Tr. II at 119-20; PX 6). Accordingly, at the time of taking the NBME Part I in June 1981, Ewing had fulfilled every course requirement for the Phase II segment of the Inteflex Program. (Tr. II at 120; Tr. I at 178).

Phase III of the Inteflex Program, which corresponds to the third and fourth years of the Medical School's Standard Program, consists of clinical training at the University's affiliated hospitals. Inteflex and Standard students are combined at this point and receive virtually identical training during the clinical phase. (Tr. I at 27-28, 147). Immediately prior to these final two years of the program, both Inteflex and Standard students take

a standardized test known as the NBME Part I. (Tr. I at 28, 147-48).

The National Board of Medical Examiners administers the NBME Part I examination (PX 4), which consists of approximately 1,000 multiple-choice questions covering the biomedical sciences. (Tr. I at 28-30). In setting the passing mark for the NBME Part I, raw scores are converted so that those examinees placing in the bottom 8-12% fail regardless of their raw scores. (Tr. I at 191, 31-32). The National Board permits any student to take the NBME Part I at least three times in an effort to pass. (PX4 at p. 16; Tr. I at 87-88). The sole qualification for taking the NBME Part I is that the student be enrolled in an accredited medical school. (PX 4 at p. 6; Tr. I at 88-89).

Ewing failed the NBME Part I the first and only time he took it.[2] (Tr. II at 133). Ewing was dismissed because of this single failure of the NBME Part I examination. (Tr. I at 157). If Ewing had passed the NBME Part I, he would have been promoted to the clinical phase of his education. (Tr. I at 163; Tr. III at 279).

Ewing has never asked a court to make him a doctor or to pass on his academic qualifications. All Ewing seeks, in accordance with Regents' established policy, is to be allowed to retake the NBME Part I and to have

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[2]Regents state that Ewing's NBME Part I score was the lowest in the school's history and point to the District Court's finding in support. (Petition at 7). Nonetheless, as was detailed in Ewing's reply brief to the Court of Appeals, no such allegation was ever raised at trial and there is no evidence in the record to support it. (Reply Brief at 14-16).

those test results determine whether he can go on with his medical education. (Tr. III at 12).

B. *The University's Unbroken Policy and Practice of Allowing Retests of the NBME Part I.*

Ewing was the only University of Michigan medical student—in either the Inteflex or Standard Program—ever denied a retest of the NBME Part I. (Tr. I at 60-61, 82-84). Every other student was given a second chance. (Tr. I at 60-61, 82-84, 156). Since 1975, 40 University of Michigan students (both Inteflex and Standard Program) failed the NBME Part I on the first occasion. (PX 1 and 18). Every student other than Ewing was permitted a retest, including an Inteflex student who failed the same session of the test that Ewing failed. (PX 1 and 18; Tr. I at 60-61, 82-84 and 156).

At the time Ewing took the NBME Part I, University of Michigan medical students were routinely given a second opportunity to take the NBME Part I if they failed the first time. (Tr. I at 159). It was a common practice to allow the retest. (Tr. I at 160). In June 1981, a Medical School publication entitled "On Becoming a Doctor" was issued by the University of Michigan (Tr. I at 90-95; 160-62; PX 3) and distributed on the campus of the University approximately a week prior to the date on which Ewing took the NBME Part I.[3] (Tr. I at 163). This

[3]The Court of Appeals found: "This University publication is important because, irrespective of whether Ewing saw this pamphlet before taking the NBME Part I, this pamphlet memorialized the consistent practice of the medical school with respect to students who initially fail that examination." (App. 33a). ("App. —" refers to the appendix to the petition containing the lower courts' decisions).

University publication paraphrased Assistant Dean Ralph M. Gibson of the Medical School and stated in part:

> According to Dr. Gibson, everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board Exams. *Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam.*

(PX 3 at 30 (emphasis added); Tr. I at 95-96; 208).

C. *By the Regents' own Standards, Ewing was a Qualified Student and Therefore Entitled to Retake the NBME Part I.*

Ewing had passed all of his course work (Tr. I at 178) and was a qualified student when he took the NBME Part I (Tr. II at 104-05; Tr. III at 181-83; representation of Regents' counsel, Tr. III at 147).[4]

By Regents' own interpretation of Ewing's record, he had a total of three deficiencies out of 23 medical school courses during his entire period of enrollment. (Tr. I at 168, PX 1 at 7). Each of Ewing's three prior academic deficiencies had been successfully removed by the time he

[4]Dean Robert E. Reed, himself a medical doctor and Director of the Inteflex Program, testified that he knew Ewing and his overall record better than anyone at the Medical School (Tr. I at 214), that Ewing was not unfit to be a doctor because of any problem with his "attitude, personality or moral character," and that Ewing had clearly demonstrated the intellectual ability to be a doctor. (Tr. I at 206). Reed also testified that Ewing had "always" acted "in a manner befitting a medical student and future physician." (Tr. I at 198-99).

sat for the NBME Part I. (Tr. I at 174-75).[5] He had no outstanding deficiencies. (Tr. II at 104; Tr. III at 289). Ewing had passed every course up to that time. (Tr. I at 178; Tr. III at 178-79; PX 6).

Of the 39 medical students permitted by Regents to retake the NBME Part I since 1975, many had more course deficiencies than Ewing, whether measured in absolute numbers or as a percentage of courses taken. (PX 1 and 18). University records, stipulated to be accurate (Tr. I at 142), reflect that of the 39 other students, one student was given four opportunities to pass the NBME Part I, even though he had three deficiencies out of 10 courses. (Tr. I at 60; PX 1 and 18 at p. 1). Ten students were permitted to take the NBME Part I examination three times each. (Tr. I at 60; PX 1 and 18). Another 28 students were given two opportunities to pass the NBME Part I. (Tr. I at 60; PX 1). One Inteflex student who failed the examination in June 1981 when Ewing took it was given three chances to pass, repeating the NBME Part I in September 1981 and June 1982. (PX 1 at p. 7). A total of seven Inteflex students were given two or more tries to pass the examination. (PX 1 at p. 7). One of these Inteflex students had academic deficiencies in nine of 23 courses prior to failing the NBME Part I and another had four deficiencies. (PX 1 at p. 7). Of the Standard students permitted an NBME Part I retest, one had aca-

[5]Regents' assertion (Petition at 6, n. 6) that Ewing's remediated course deficiencies had not been removed is contrary to Regents' own letter to Ewing informing him of "the removal of your . . . deficiency" (PX 9) and the testimony of the faculty that Ewing had no deficiencies when he took the NBME Part I. (Tr. I at 174-75; Tr. II at 104; Tr. III at 289).

demic deficiencies in fully 70% of his courses, seven of 10, and another in 50%. (Tr. I at 47-50. 133; PX 1 and 18). Academic deficiencies by Standard students were considered just as serious as those by Inteflex students. (Tr. I at 155-56). Only Ewing of the 40 Inteflex and Standard students had received both an Honors grade for outstanding academic achievement and had published research during his medical school education. (Tr. I at 57-58, 186-90; JX 1; PX 10; PX 11; PX 17; PX 18).

REASONS FOR DENYING THE WRIT

I. This Case Raises No Novel Or Controversial Question Of Law Regarding The Eleventh Amendment.

Faced with the decision on the merits by the Court of Appeals that they violated Ewing's constitutional rights, Regents now seek to overturn that decision by characterizing the judgment as one which this Court's decision in *Pennhurst State School and Hospital v. Halderman*, — U.S. —, 104 S. Ct. 900 (1984), would invalidate. This contention is without merit.

A. Pennhurst is inapplicable.

This Court's decision in *Pennhurst* has no application to this case. *Pennhurst* involved the power of federal courts to issue judgments requiring state officials to conform their behavior to state law. This Court reversed a federal court injunction enjoining violations of a state law, the Pennsylvania Mental Health and Mental Retardation Act of 1966, by Pennsylvania state officials operating a state school and hospital. The *Pennhurst* decision is premised on considerations of the interpretation of

state law by federal courts, specifically where the federal court imposes its authority over state officials to regulate their conduct in accordance with *state* law. In contrast, this case concerns a violation of *federal* law, 42 U.S.C. § 1983, by state officials. The interpretation of federal law by the United States Court of Appeals for the Sixth Circuit here simply does not raise the same issues of federalism which underlie the *Pennhurst* decision.

Ewing claimed that Regents, under color of state law, deprived him of a property interest which is protected by the Constitution. While property interests are created and defined by state law and include contractual provisions or mutual implied understandings, *Jago v. Van Curen,* 454 U.S. 14, 18 (1981); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972); *Perry v. Sindermann,* 408 U.S. 593, 601-02 (1972), the deprivation of that right is a federal constitutional violation. The Court of Appeals in this case properly held that "an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections." App. 31a. *Pennhurst* does not preclude injunctive relief against state officials for violation of federal law. *Barnes v. Cohen,* 749 F.2d 1009, 1019 (3d Cir. 1984); *Students of California School For the Blind v. Honig,* 736 F.2d 538, 543 (9th Cir. 1984). Unlike *Pennhurst,* Regents are charged with violating federal law by depriving Ewing of his state-recognized property interest. The inapplicability of *Pennhurst* as a bar to relief is reconfirmed by this Court's recent decision in *Brandon v. Holt,* 53 U.S.L.W. 4122 (U.S. Jan. 21, 1985), which cites with approval *Hutto*

v. Finney, 437 U.S. 678 (1978), for the proposition that prospective injunctive relief against state officials for Section 1983 violations is not barred by the Eleventh Amendment. The Regents' reliance on *Pennhurst* as a justification for their petition is misplaced.

B. The only issue in this case is a semantic one.

Contrary to the Regents' recent attempts to recharacterize it, this case does not present any broad question regarding the limits of the state's immunity from liability for violations of 42 U.S.C. § 1983. *See Brandon v. Holt, supra; Hutto v. Finney, supra; Ex Parte Young,* 209 U.S. 123 (1908). The only issue in this case involving the Eleventh Amendment is essentially a semantic one.

Ewing has not only stated a claim under 42 U.S.C. § 1983, but proved it. In an effort to avoid liability, Regents now argue that Ewing has not really sued Regents individually in their official capacities, and, as a result, the Eleventh Amendment bars relief. Ewing should not be stripped of any injunctive relief awarded him because of a semantic argument by the wrongdoer. In drafting the pleadings in this case, Ewing named as defendant the "Board of Regents of the University of Michigan." Ewing does not contest the fact that under existing law to be entitled to relief the injunction must run against officials of the University, unless the University has waived its immunity as has also occurred here. Ewing contends that, in suing Regents, he has satisfied this legal requirement. Regents have tardily decided—after a full trial and appeal—that Ewing has not.

By suing the Board of Regents, rather than the University or the State of Michigan directly, Ewing has sued the officials responsible for running the University in

their official capacity. The Board of Regents of the University of Michigan is "a body corporate" charged with supervising the University and managing its funds. Michigan Constitution of 1963, Article 8 § 5; MCL 390.4. Furthermore, Regents' conduct in appearing and defending this action has been consistent with the principle that injunctive relief against the named Regents is not barred by the Eleventh Amendment. A detailed review of the facts of this case, including its procedural history, make this apparent.

In the District Court, Regents explicitly acknowledged that the injunctive relief sought by Ewing in Count I, based upon 42 U.S.C. § 1983, and Count II, based upon contract right, was not barred by the immunity defense of the Eleventh Amendment. In opposing Count III for damages in Ewing's complaint, Regents stated that

> [i]n fact, the eleventh amendment bars any damage action against either the University or its officials here. *Weisbord v. Michigan State University,* 495 F. Supp. 1347 (W.D. Mich. 1980). It is only as to prospective injunctive relief (such as that sought in Counts I and II of instant plaintiff's Complaint) that the immunity defense of the eleventh amendment is inoperative. *Edelman v. Jordan,* 415 U.S. 651 (1973); and *Tayyari v. New Mexico State University,* 495 F.Supp. 1365 (D. N.M. 1980) (parenthetical phrase in original).

Regents' "Memorandum Brief in Support of Motion to Dismiss Count III for Failure to State a Claim" filed September 8, 1982.

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[6]Regents' citation to *Edelman* and *Tayyari* for the proposition that Ewing could obtain injunctive relief despite the Eleventh Amendment reveals the Regents' understanding that, as in *Edelman* and *Tayyari,* injunctive relief was being sought against public officials.

While successfully asserting the Eleventh Amendment as a defense to Count III seeking damages, Regents proceeded to a full non-jury trial on the merits as to the three counts for injunctive relief contained in the Amended Complaint. Regents consistently regarded the Eleventh Amendment to be applicable to the damage claim and not to the claim for injunctive relief. This is demonstrated repeatedly by excerpts from the Regents' "Memorandum Brief in Opposition to Plaintiff's Motion for Entry of Preliminary Injunction" (Oct. 13, 1982). Regents candidly acknowledged,

> Because the defendants have interposed the defense that the eleventh amendment prevents recovery of money damages, *the only relief which plaintiff can obtain if he is successful is equitable.*

Id. at 11 (emphasis added). Later in this same document the Regents further conceded their liability for injunctive relief even if their Eleventh Amendment defense against monetary damages proved successful:

> If defendant University is found to be liable to plaintiff and is also unsuccessful in sustaining its defense of eleventh amendment immunity *from damages,* plaintiff will have adequate remedies at law. . . .
>
> If defendant University is found to be liable even though it is protected by the eleventh amendment, *plaintiff will enjoy the favor of equitable remedies.* . . . The University could then be made to provide him with needed tutorial services to assist him in his review or to assist him in finding employment beyond his normal expectations.

Id. at 30-31 (emphasis added).

Regents made no mention of the Eleventh Amendment in their trial brief (dated January 7, 1983), in their

post-trial brief (dated January 14, 1983), or in their closing argument (January 14, 1983). When the District Court ruled in favor of Regents on those counts, Ewing appealed the entry of judgment on Counts I, II and IV to the Sixth Circuit Court of Appeals. Although Ewing in his initial brief in the Court of Appeals stated his position that *Ex Parte Young,* 209 U.S. 123 (1908), permitted the requested injunctive relief,[7] Regents omitted any reference whatsoever to the Eleventh Amendment in their brief on the merits and at oral argument. In their unsuccessful petition for rehearing, Regents challenged the purported "retroactive" nature of the injunctive relief on Eleventh Amendment grounds, but they did not assert any immunity as to prospective injunctive relief.

The only rational explanation for Regents' position regarding the applicability of the Eleventh Amendment to the damage claim but not to the injunction claims is that, as in *Edelman,* which Regents cited, Regents perceived that a monetary judgment against Regents is barred since the financial loss would be borne by the state, while injunctive relief against Regents would run against the officials and is not barred. This analysis is the only logical way to reconcile Regents' divergent treatment of the damage and injunction counts.

A complaint naming the office or the agency, but not the current agents by individual name, is properly construed as a suit against the officials in their official capacities. *Weisbord v. Michigan State University,* 495 F. Supp. 1347 (W.D. Mich. 1980). In *Weisbord,* the plaintiff seeking relief under 42 U.S.C. § 1983 and other statutes named as defendants various offices of Michigan State University. Acknowledging the policy underlying Section 1983 of not dismissing claims unless it appears no claim for relief can be stated, the court held that it would construe the complaint as one against the officials holding those offices in their official capacities. Specifically, the court stated:

> Plaintiff has technically not named any state officials as defendants, having merely named the offices or titles held by those officials. In view of the liberal pleading requirements of the Federal Rules, *see,* Fed.R.Civ.P. 1, and the standards for dismissing a civil rights action in particular, *Westlake v. Lucas,* 537 F.2d 857 (6th Cir. 1976); *Lucarell v. McNair,* 453 F.2d 836 (6th Cir. 1972), the court will construe the complaint as one against the state officials who constitute the Board of Trustees and the President of Michigan State University in their official capacities. To do otherwise would be to exalt form over substance, and accomplish no more than delay in the lawsuit inasmuch as plaintiff would be free to amend his complaint to name these specific individuals by name if the action was dismissed on this narrow technical ground.

Id. at 1355.

II. If A Pleading Defect Exists, Ewing May Simply Amend His Complaint To Conform To The Evidence Under Brandon v. Holt.

If any pleading defect is perceived, a straightforward application of Rule 15(b) of the Federal Rules of Civil Procedure, as in *Brandon v. Holt,* 53 U.S.L.W. 4122 (U.S. Jan. 21, 1985), permitting amendment

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[7]Ewing's brief stated: "Furthermore, the eleventh amendment does not preclude injunctive relief against the Board. *Ex Parte Young,* 209 U.S. 123 (1908); *Hutto v. Finney,* 437 U.S. 678, 690 (1978); *Jackson v. Hayakawa,* 682 F.2d 1344, 1350-51 (9th Cir. 1982)." Plaintiff-Appellant's Brief at 16.

of the pleadings to conform to the proof, provides a complete resolution of this issue. There is no reason for review by this Court of such a readily curable pleading matter, if a cure is required at all. Granting the writ on this issue is an unwarranted use of scarce judicial resources.

Since the Regents agreed to go to trial on the merits of this case, apparently seeking to establish the validity of Regents' conduct, Ewing should be permitted to amend his complaint, if any amendment is needed to obviate Eleventh Amendment problems. By amendment Ewing would simply name more specifically the individual Regents as defendants instead of the Board of Regents. If such an amendment were made, there is no question that the Eleventh Amendment is inapplicable. *Ex Parte Young,* 209 U.S. 123 (1908). Such an amendment to cure a pleading defect was recently sanctioned by this Court in an action brought under 42 U.S.C. § 1983. In *Brandon v. Holt* this Court in permitting an amendment to a complaint originally naming the Director of Police of the City of Memphis to add the city as a defendant, stated:

> Given this state of the record, even at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the District Court's findings of fact. Moreover, it is appropriate for us to proceed to decide the legal issues without first insisting that such a formal amendment be filed. . . .

53 U.S.L.W. at 4124 (footnote omitted).

There is no prejudice in allowing an amendment here, since the evidence at trial proved a violation of Section 1983 by the agents of the University in arbitrarily dismissing Ewing. The evidence in this case is all about the conduct of the individual deans and faculty members of the University acting in their official positions;

Regents in their official positions are ultimately responsible for this conduct.

This view that plaintiff should be allowed to substitute, as defendants, the constituent members of a corporate body for that body by amendment has been endorsed by the courts of appeals. In *Arthur v. Nyquist,* 573 F.2d 134 (2d Cir.) *cert. denied,* 439 U.S. 860 (1978), for example, the Second Circuit permitted plaintiffs in a class action civil rights suit to join individual officials in their official capacities as defendants after the trial was concluded. In permitting the amendment, the court noted that Section 1983 actions implicate three different types of entities: (1) corporate bodies; (2) constituent members of corporate bodies in their representative capacities; and (3) constituent members in their individual capacities. The court held that the first two categories, corporate bodies and their members in their official capacities, are for jurisprudential purposes, "interchangeable before, during and after trial." *Id.* at 140. *Cf. Jackson v. Hayakawa,* 682 F.2d 1344 (9th Cir. 1982); *Gay Students Org. of Univ. of New Hampshire v. Bonner,* 509 F.2d 652 (1st Cir. 1974).

Finally, in *Patsy v. Board of Regents,* 457 U.S. 496 (1982), in reinstating a civil rights action dismissed on the pleadings, this Court specifically acknowledged that the district court could "permit amendments to the pleadings that might cure any potential Eleventh Amendment problems." *Id.* at 515-16, n. 19.

Since Regents, in both lower courts, have regarded the injunction claims to be outside the Eleventh Amendment in a suit naming them as defendants, amendment under F.R.C.P. 15 (b) and *Brandon* to name Regents individually in their official capacities would cure any technical deficiency. Because the propriety of this same type of

amendment was decided by the Court this Term, the petition raises no Eleventh Amendment question warranting review. Such a review here would not only leave the result in this case unchanged, it would merely reiterate existing law.

III. Even If Regents Were Entitled To Some Form Of Immunity, They Have Waived That Immunity.

In this litigation, Regents have on many occasions conceded that they are not entitled to immunity against the injunction counts. While the Eleventh Amendment may be raised on appeal, Regents' conduct here constitutes a waiver of any immunity which Regents may have had. *See Toll v. Moreno,* 458 U.S. 1 (1982).

In *Toll v. Moreno,* based on the conduct of the parties in litigation which is strikingly similar to this case, this Court held that a university waived its Eleventh Amendment immunity. In *Toll,* the plaintiff brought an action for declaratory and injunctive relief against the state-operated University of Maryland and its president. The district court entered an injunction directing the university to pay refunds to students who, but for the university's unconstitutional policy, would have paid reduced tuition. In seeking a stay of that order pending appeal, the university represented to the district court that in the event the order appealed from was affirmed, it would make funds available to make refunds in accordance with the judgment. Based on this action by the university, this Court held that it waived any Eleventh Amendment immunity to which it may have been entitled. 458 U.S. at 18.

A detailed review of the facts and the procedural history of this case reveals that Regents have conceded on

numerous occasions that Ewing was entitled to injunctive relief against Regents, if he could show a section 1983 violation.

In a consistent strategy, Regents sought a decision on the merits on Ewing's substantive due process claim in hope of establishing a judicial precedent to insulate even arbitrary and capricious academic conduct from judicial review. The strategy is manifest in a myriad of ways: (1) in seeking dismissal of Count III for monetary damages on Eleventh Amendment grounds but pressing no similar motion to dismiss the injunction counts[8], (2) in filing a memorandum saying the Eleventh Amendment was "inoperative" to Ewing's request for injunctive relief ("Memorandum Brief in Support of Motion to Dismiss Count III for Failure to State a Claim" filed on September 8, 1982; at p. 4); (3) in stating that Ewing would "enjoy the favor of equitable remedies" even if Regents prevailed on their Eleventh Amendment defense and that because of the Eleventh Amendment "the only relief which plaintiff can obtain if he is successful is equitable" ("Memorandum Brief in Opposition to Plaintiff's Motion for Entry of Preliminary Injunction" filed on October 13, 1982; at p. 31, 11); (4) in omitting any reference to the Eleventh Amendment in their trial memorandum (dated January 7, 1983), during the trial itself, including closing argument of counsel to the district judge, and in their post-trial memorandum (dated January 14, 1983); (5) in omitting any

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[8]In the Answer to the Amended Complaint containing both the damage and injunction counts, Regents pleaded the Eleventh Amendment as an affirmative defense. However, they never referred to it, except in the context of Count III seeking damages, in the District Court or referred to it in the Court of Appeals prior to petitioning for rehearing.

reference whatsoever to the Eleventh Amendment in their original brief and argument to the Sixth Circuit; and (6) in limiting their reference to it in their rehearing petition in the Sixth Circuit to an Eleventh Amendment bar to retroactive injunctive relief. Only in their petition to this Court have Regents pressed an Eleventh Amendment argument which would bar even prospective injunctive relief.

By their explicit representations to the District Court acknowledging the Eleventh Amendment and yet consenting to be sued, Regents have waived any Eleventh Amendment defense they may have. Having waived the defense as to the injunctive counts, under the teaching of *Toll v. Moreno,* 458 U.S. at 18, Regents are barred from resurrecting the defense.

As a policy matter, defendants should not be encouraged to "ambush" successful plaintiffs in this manner. Regents in this case should not be permitted to exploit what they now perceive to be an ambiguity in Ewing's characterization of them.

IV. Because There Is No Disagreement Among The Lower Courts On Whether An Arbitrary And Capricious Student Dismissal Is Potentially Actionable, Nor Any Decision By This Court To Suggest Otherwise, This Fact-Bound Case Is Unworthy Of Supreme Court Review.

The Sixth Circuit's decision below neither conflicts with the decisions of this Court nor those of the other courts of appeals. The Sixth Circuit applied the stringent "arbitrary and capricious" standard to review a substantive due process claim—the test either assumed or actually applied in all of the decisions cited by Regents. The only

difference in his case is factual. Ewing, as an issue of fact, prevailed under this difficult standard. Since no conflict of law is present, issuance of a writ is not warranted.

Regents in their petition essentially question whether a dismissed medical student is entitled to any judicial review of his substantive due process rights at all. Although this Court has not expressly addressed the issue of a dismissed student's substantive due process rights, it has nonetheless acknowledged, in *Board of Curators v. Horowitz,* 435 U.S. 78 (1978), that "a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or capricious.'" *Id.* at 91 (citations omitted). Moreover, this Court appears to have tacitly approved of judicial review in such circumstances by having itself conducted a review in *Horowitz* sufficient to conclude that "no showing of arbitrariness or capriciousness has been made in this case." *Id.* at 92 (footnote omitted). Indeed, while most courts have interpreted this Court's comments as permitting substantive review under the arbitrary and capricious standard, no court has viewed *Horowitz* as precluding such a cause of action.[9] *See, e.g., Stol'er v. College of Medicine,* 562 F.

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[9]The Regents have argued in their petition, for the first time in this litigation, that "[s]ome courts have held that this Court's admonition in *Horowitz* forecloses substantive judicial review altogether." Petition at 16. Cited in support are *Lavash v. Kountze,* 473 F. Supp. 868 (D. Mass.), *aff'd* 604 F.2d 103 (1st Cir. 1979) and *Hubbard v. John Tyler Community College,* 455 F. Supp. 753 (E.D. Va. 1978). Neither of these cases, however, held that *Horowitz* precludes such a review. *Lavash* is solely

(Continued on following page)

Supp. 403, 412 (M.D. Pa. 1983), *aff'd* 727 F.2d 1101 (3d Cir. 1984); *Hines v. Rinker,* 667 F.2d 699, 703 (8th Cir. 1981); *Stevens v. Hunt,* 646 F.2d 1168, 1170 (6th Cir. 1981); *Nuttelman v. Case Western Reserve University,* 560 F. Supp. 1, 3 (N.D. Ohio 1981), *aff'd* 708 F.2d 726 (6th Cir. 1982); *Crook v. Baker,* 584 F. Supp. 1531, 1562 (E.D. Mich 1984). Even the District Court here noted,

> Other post-*Horowitz* decisions have either tacitly or expressly concluded that *Horowitz* does allow such substantive review. *Dietz v. American Dental Ass'n,* 479 F.Supp. 554 (E.D. Mich. 1978); *Aubuchon v. Olsen,* 467 F.Supp. 568 (E.D. Mo. 1979); *Watson v. University of South Alabama College of Medicine,* 463 F.Supp. 720 (S.D. Ala. 1979); *Bleicker v. Board of Trustees of the Ohio State University, College of Veterinary Medicine,* 485 F.Supp. 1381 (S.D. Ohio 1980). A recent Fifth Circuit decision not only allowed such review, but found that the academic decision in question was arbitrary and capricious in that it required students to be tested on materials which they had not been adequately taught. *Debra P. v. Turlington,* 644 F.2d 397 (5th Cir. 1981).

App. 22a (footnote omitted).

(Continued from previous page)

a procedural due process case. 473 F. Supp. at 872. In *Lavash* the First Circuit noted that "[t]he Supreme Court in *Board of Curators, Univ. of Mo. v. Horowitz,* [citations omitted], held that, *absent arbitrariness or capriciousness,* dismissals for academic reasons do not necessitate a due process hearing." 604 F.2d at 106 (emphasis added). In *Hubbard,* a district court concluded that this Court's comments in *Horowitz* left unanswered the extent to which substantive due process review is permitted. 455 F. Supp. at 755 ("The Supreme Court, thus, did not directly pass on the validity of implications of lower court 'dictum' on substantive due process"). Finally, the defendant school in *Hubbard* was found to have acted properly because it had followed its own rules and was "only asking of plaintiff what it asks of all nursing students." 455 F. Supp. at 756.

The District Court also observed that, while *Horowitz* "demonstrates the continuing vitality of this hands-off approach in warning against judicial intrusions into such areas," App. 23a (citation omitted),

> [t]his is not to say that decisions as to academic qualification are not subject to substantive due process review. Throughout this century this constitutional requirement has constantly been interpreted as requiring both procedural and substantive compliance. *Kelley v. Johnson,* 425 U.S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976). So long as protected interests (life, liberty or property) are implicated, the Constitution mandates that due process, including all of its component parts, be accorded.

App. 24a. Similarly, Regents, too, have acknowledged that an arbitrary and capricious dismissal is potentially actionable. Defendant-Appellee's Brief at 14, 17.

If this sort of limited substantive review of a student's dismissal were not permitted, a university could not only treat similarly situated students differently and disregard without notice the very rules it itself once promulgated for sound educational reasons, but it could also, for example, retroactively increase the number of credits required for graduation or even rescind a former student's degree absent just cause. Indeed, as improbable as the rescission of a degree might seem, this is precisely what Regents attempted in another recent case. *Crook v. Baker,* 584 F. Supp. 1531 (E.D. Mich. 1984). In that case, Regents endeavored to rescind a former student's master's degree. The district court there held, with respect to the substantive due process claim:

> It is clear . . . that plaintiff was deprived of his constitutionally protected property and liberty interests by the actions of the defendants. The only ques-

> tion is whether that deprivation was arbitrary and capricious. The court concludes, as a matter of law, that it was. . . .

Id. at 1562.

Under Michigan law, Ewing had a property interest in not being arbitrarily dismissed. *See Booker v. Grand Rapids Medical College,* 156 Mich. 95, 120 N.W. 589 (1909), (discussed by Court of Appeals (App. 30a-31a)). It should be emphasized that Ewing has in no way sought to enlarge the judiciary's limited presence in the academic community and has only sought protection of his state-recognized property interest. As has been repeatedly stressed throughout this litigation,

> Ewing does not challenge the Board's [Regents'] authority to establish the criteria for training or evaluating medical students; rather, Ewing vigorously challenges the Board's right to disregard its own preset rules and criteria in order to deny one student, Ewing, what every other similarly situated student has received—an opportunity to retake the NBME Part I.

Plaintiff-Appellant's Reply Brief at 2. Thus, Ewing has no quarrel with Regents' position that decisions as to academic qualifications are matters peculiarly within the faculty's competence. It is not for courts of law to second-guess a student's grades or test scores. However, this principle does not bar courts from considering whether a school has breached its contractual relations with its students, has violated its own published rules and established practices or has otherwise deprived a student of a property interest by its arbitrary and capricious conduct. As the Eighth Circuit observed in *Greenhill v. Bailey,* 519 F.2d 5 (8th Cir. 1975),

> It is true that courts will ordinarily defer to the broad discretion vested in public school officials and will rarely review an educational institution's evaluation of the academic performance of its students. [Citations omitted.] Notwithstanding this customary "hands-off" policy, judicial intervention in school affairs regularly occurs when a state educational institution acts to deprive an individual of a significant interest in either liberty or property.

Id. at 7 (citations omitted).

This Court, too, has recognized that there is no compelling reason to place school officials beyond the law's reach. Although specifically directed at the qualified good-faith immunity of school officials from liability for damages under Section 1983, the Court's comments in *Wood v. Strickland,* 420 U.S. 308 (1975), are broadly applicable to the instant case. In *Wood,* this Court observed that "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Id.* at 320. For the same reason, a student who may have been arbitrarily and capriciously dismissed is entitled to at least some substantive due process review by a court of law. In such cases, the burden of proof is at all times on the student.

Moreover, as the extremely small number of successful student plaintiffs convincingly attests, the arbitrary and capricious standard is an appropriately difficult one to meet. As a result, no conscientious school official should ever feel threatened by this review. Indeed, the commu-

nity of medical educators at large seems well aware that, its broad discretionary authority in academic matters notwithstanding, it cannot act arbitrarily with impunity. *See*, e.g., Irby, Fantel, Milam and Schwarz, *Special Report: Legal Guidelines for Evaluating and Dismissing Medical Students,* 304 New England Journal Of Medicine 180, 182 (1981) ("[A]rbitrary and capricious steps by the faculty are actionable, but the burden of proof is on the student"). It is "only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student." *Connelly v. University of Vermont and State Agr. Col.,* 244 F. Supp. 156, 160 (D. Vt. 1965). *See also Gasper v. Bruton,* 513 F. 2d 843, 850 (10th Cir. 1975) ("Courts have historically refrained from interfering with the authority vested in school officials to drop a student . . . absent a clear showing that the officials acted arbitrarily or have abused the discretionary authority vested in them").

The above discussion makes it clear that it would not have been proper for the lower courts to review Ewing's academic record to determine whether he was qualified to sit for the NBME Part I in the first instance.[10] Nor would it have been proper for the courts to review the appropriateness of the University's NBME retest rule, which provided that "[s]hould a [qualified] student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." PX 3

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[10]Ironically, though the District Court explicitly warned against a review of this sort in its opinion, App. 24a-25a, it nevertheless failed to heed its own admonition. In doing so the District Court even found "deficiencies" where the medical faculty found none. Tr. I at 201-02; Tr. II at 90-91, 102, 106-07.

at 30. The medical faculty alone possessed the expertise for these determinations. However, the law does not permit Regents, with impunity, to retroactively and unilaterally alter the rules which they themselves previously established. Regents set the rules, as they were empowered to do: but having set the rules, Regents must live by them, too.

Once it is acknowledged that universities are not above the law and that a dismissed medical student is entitled to at least a limited substantive due process review to safeguard against arbitrary and capricious dismissal, the only issue remaining is whether the facts here support a finding of arbitrariness and capriciousness. In this regard, the Sixth Circuit was unequivocal: "The evidence plainly demonstrates that the University treated Ewing in an arbitrary and capricious manner by not allowing him a second opportunity to take Part I of the NBME." App. 33a. In support of its conclusion, the Court of Appeals noted, among other things, that there is

> substantial and uncontroverted evidence in the trial record that at the time Ewing took the NBME Part I, medical students were routinely given a second opportunity to pass it. Joint Appendix at 157-58. In fact, the evidence is undisputed that between 1975 and 1982, of the forty medical students who failed the NBME Part I on the first attempt, every one of these students was allowed a reexamination except Ewing. Joint Appendix at 110-11.

App. 32a.

In view of this Court's traditional and proper reluctance to accept for review cases involving little more than disputed facts, it must be noted that much of Regents' argument in support of granting the writ relies on

just such matters. For example, Regents contend that Ewing was on "strict academic probation" when he took the NBME Part I. Petition at 5. This contention, however, is not new but was in fact emphasized by Regents in their argument before the Court of Appeals. Defendant-Appellee's Brief at 23-24. Yet the Sixth Circuit was not persuaded, and rightly so, since the evidence strongly suggests that if Ewing ever had been on probation, he was removed from it in advance of the examination date. Tr. I at 173-75; Tr. III at 253-54, 287-89; PX 9.

Finally, Regents' assertion that the Court of Appeals has usurped their authority by proclaiming Ewing a qualified student is erroneous. As the Court of Appeals observed, it was actually Regents themselves who made this determination:

> There is substantial evidence in the record, and there is no district court finding to the contrary, that Ewing was a "qualified" student, *as the University defined that term,* at the time he sat for the NBME Part I. Joint Appendix at 298, 299.

App. 33a (emphasis added). The reference by the Court of Appeals to the Joint Appendix contains the following exchange between Ewing's counsel and Dean Reed, director of the Inteflex Program during the entire period of Ewing's enrollment and chairman of the Promotion and Review Board[11]:

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[11]As chairman, Dean Reed was the only person empowered to speak for the Review Board as a whole. See the testimony of Promotion and Review Board member Dr. Friedman: "The only person who speaks for the Promotion Board is Dr. Reed." Tr. III at 289.

Q. (By Mr. Conway): Am I correct, then, Mr. Ewing had no outstanding deficiency when he took the NBME Part I?

A. That's correct.

Q. Was Mr. Ewing a qualified medical student at the time he took the NBME Part I?

A. Yes; he was in good standing, at that time.

Q. You were asked, by Mr. Davis [Regents' counsel], about Plaintiff's Exhibit 3 [the University publication "On Becoming a Doctor"]; do you recall this booklet?

A. Yes.

Q. Do you recall the quote of Dr. Gibson [at p. 30 on "On Becoming a Doctor"] with respect [to] "every qualified medical student" being given an opportunity to make up a failure [of the NBME Part I] in a second exam?

A. Yes.

Q. And at the time Mr. Ewing took the exam, he was a qualified medical student, was he not?

A. At the time he entered the examination, yes.

Tr. II at 104-05. Other, equally explicit testimony confirmed that Ewing was considered, by Regents themselves, a "qualified" student and thus entitled to the benefits of the University's retest rule. Tr. III at 181-82, 147.

———o———

CONCLUSION

For the foregoing reasons, Ewing respectfully requests that the writ be denied.

Respectfully submitted,

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No. 84-1273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

v.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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JOINT APPENDIX

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Defendant's Exhibit 19, July 30, 1980, warning letter to Ewing reminding him that any further deficiency would be grounds for his dismissal JA-146

Defendant's Exhibit 49, Excerpts from Medical School Executive Committee meeting minutes, August 27, 1981 .....JA-147

Defendant's Exhibit 50, Excerpts from Medical School Executive Committee meeting minutes, June 17, 1982 .....JA-150

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OPINIONS AND JUDGMENTS BELOW

The following Opinions, Decisions, Judgments, and Orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the printed Petition for Certiorari:

A. Final Judgment, United States District Court for the Eastern District of Michigan, Southern Division (December 4, 1984) 1a

B. Memorandum Opinion, United States District Court for the Eastern District of Michigan, Southern Division (December 15, 1982) [*Ewing* v. *Board of Regents of The University of Michigan,* 552 F.Supp. 881 (E.D. Mich. 1982)] 4a

C. Opinion, United States District Court for the Eastern District of Michigan, Southern Division March 22, 1983) [*Ewing* v. *Board of Regents of The University of Michigan,* 559 F.Supp. 791 (E.D. Mich. 1982)] 12a

D. Opinion, United States Court of Appeals for the Sixth Circuit (September 6, 1984) [*Ewing* v. *Board of Regents of The University of Michigan,* 742 F.2d 913 (6th Cir. 1984)] 28a

E. Judgment, United States Court of Appeals for the Sixth Circuit (September 6, 1984) 34a

F. Order Denying Petition for Rehearing *En Banc,* United States Court of Appeals for the Sixth Circuit (October 31, 1984) 35a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

United States District Court, Eastern District of Michigan, Southern Division (Ann Arbor)

Date—Entry #—Document

08/19/82—1—Complaint

08/26/82—6—Order of disqualification and reassignment to Judge Feikens

09/08/82—9—Defendant's Motion to Dismiss Count III for Failure to State a Claim, Motion for More Definite Statement, Motion to Strike, and Motion to Compel Separate Numbering of Paragraphs

09/15/82—10—Plaintiff's Motion for Entry of Preliminary Injunction

09/28/82—13—Defendant's Partial Objections and Partial Answers to Plaintiff's First Set of Interrogatories

09/28/82—14—Defendant's Objections to Plaintiff's Second Set of Interrogatories

09/28/82—15—Defendant's Response to Plaintiff's First Request to Admit Facts and Genuineness of Documents

09/28/82—16—Defendant's Response to Plaintiff's First Request for Production of Documents

10/05/82—20—Plaintiff's Response in Opposition to Defendant's Motion to Dismiss

10/14/82—22—Defendant's Response in Opposition to Plaintiff's Motion for Entry of Preliminary Injunction

10/18/82—25—Plaintiff's Motion to Overrule Defendant's Objections to Interrogatories and Document Requests

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Date—Entry #—Document

10/21/82—26—Plaintiff's Exhibits A through D, Attachments and Affidavits of Scott E. Ewing, Robert E. Anderson, M.D., Robert J. Schott, M.D., and Michael Liepman, M.D., in support of his Motion for Preliminary Injunction

10/21/82———Bench rulings:

—Plaintiff's Motion for Preliminary Injunction—case put on accelerated docket

—Plaintiff's Motion to Overrule Defendant's Objections to Interrogatories and Document Requests—defendant ordered to produce statistics with respect to other students who failed the NMBE, but not those students' names or files. Protective Order to be stipulated to later if necessary

—Defendant's Motion to Dismiss—taken under advisement

10/29/82—28—Defendant's Brief on Issue of Waiver of Government Immunity

10/29/82—31—Notice of Settlement Conference and Trial Date:

—Settlement conference: 1/5/83
—Trial: 1/10/83

11/02/82—30—Plaintiff's Supplemental Brief in Opposition to Motion to Dismiss

11/15/82—33—Plaintiff's Amended Complaint

11/30/82—35—Answer to Plaintiff's Amended Complaint

11/30/82—36—Protective Order

DOCKET ENTRIES Continued

Date—Entry #—Document

11/30/82—37—Order compelling filing of First Amended Complaint and Answer and Regulating Discovery

12/15/82—39—Memorandum Opinion and Order Granting Defendant's Motion to Dismiss Count III

12/20/82—40—Defendant's Answers to Plaintiff's Third Set of Interrogatories, Defendant's Amended Answers to Plaintiff's First and Second Interrogatories, and Defendant's Amended Response to Plaintiff's First Request for Production of Documents

01/05/83—46—Plaintiff's Trial Brief

01/08/83—44—Defendant's Trial Brief

01/10/83———Bench trial begins; testimony taken

01/11/83———Bench trial continues; testimony taken

01/12/83———Bench trial continues; testimony taken

01/12/83—47—Plaintiff's Supplemental Trial Brief

01/14/83———Bench trial continues; closing arguments Taken under advisement

01/14/83—48—Defendant's Post-Trial Brief

03/22/83—49—Opinion—in favor of defendant and against plaintiff on all counts

04/05/83—50—List of plaintiff's trial exhibits

04/05/83—52—Revised list of defendant's trial exhibits

04/11/83—55—Judgment of No Cause for Action and Order Denying Injunctive Relief

05/05/83—56—Notice of Appeal by plaintiff from Judgment and Order

DOCKET ENTRIES Continued

Date—Entry #—Document
08/24/83—67—Stipulation and Order Modifying Protective Order entered 11/30/82
11/13/84———File returned from Sixth Circuit Court of Appeals
12/04/84—80—Final Judgment

United States Court of Appeals for the Sixth Circuit

05/12/83—1—Notice of Appeal; cause docketed

07/70/83—8—Certified record filed

10/18/83—8—Appellant's Brief

11/28/83—9—Appellee's Brief

12/27/83—12—Appellant's Reply Brief

01/03/84—14—Joint Appendix

07/18/84—16—Oral argument

09/06/84—17—Opinion

09/20/84—18—Appellee's Petition for Rehearing En Banc

10/31/84—21—Order Denying Petition for Rehearing En Banc

11/08/84—22—Mandate Issued

RELEVANT PLEADINGS

United States District Court for the Eastern District of Michigan

UNITED STATES OF AMERICA
.UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
ANN ARBOR

No. 82-60271

SCOTT E. EWING,
Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Defendant.

HON. JOHN FEIKENS, Chief Judge

Excerpts From MEMORANDUM BRIEF IN SUPPORT OF MOTION TO DISMISS COUNT III FOR FAILURE TO STATE A CLAIM; and, as to the remaining counts, MOTION FOR MORE DEFINITE STATEMENT, MOTION TO STRIKE AND MOTION TO COMPEL SEPARATE NUMBERING OF PARAGRAPHS

[Filed September 8, 1982]

• • •

[p. 4]

• • • In fact, the Eleventh Amendment bars any damage action against either the University or its officials here. *Weisbord* v. *Michigan State University*, 495 F Supp 1347 (W.D. Mich. 1980). It is only as to prospective injunctive relief (such as that sought in Counts I and II of instant plaintiff's Complaint) that the immunity defense of the

Eleventh Amendment is inoperative. *Edelman* v. *Jordan*, 415 US 651 (1973); and *Tayyari* v. *New Mexico State University*, 495 F Supp 1365 (D. N.M. 1980).

• • •

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
ANN ARBOR

No. 82-60271

SCOTT E. EWING,
Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Defendant.

HON. JOHN FEIKENS, Chief Judge

Excerpts From DEFENDANT'S RESPONSE TO PLAINTIFF'S FIRST REQUEST TO ADMIT FACTS AND GENUINENESS OF DOCUMENTS

[Filed September 28, 1982]

NOW COMES the defendant, by counsel, and repeats and answers plaintiff's First Request to Admit Facts and Genuineness of Documents as follows:

REQUEST NO. 1

No student, other than Plaintiff Scott E. Ewing, has been dismissed from the University of Michigan Medical School or the Inteflex Program as a result of only a single failure of the National Board of Medical Examiners Part I test.

ANSWER TO REQUEST NO. 1

Plaintiff was not dismissed only because of his single failure of the NBME Part I test; he had other deficiencies as well and had received a prior warning. Thus, no student,

including plaintiff, was dismissed solely because of a failure of the NBME Part I test. Mr. Ewing was dismissed because he failed the NBME Part I test after being placed on warning.

• • •

REQUEST NO. 3

It is a policy of the University of Michigan Medical School to allow at least one retest if a student fails to achieve a passing grade on the National Board of Medical Examiners Part I test.

ANSWER TO REQUEST NO. 3

It is not a policy but a practice which is observed *only* where the student has not been warned for prior deficient, unacceptable or inadequate work.

• • •

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
ANN ARBOR

No. 82-60271

SCOTT E. EWING,
Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Defendant.

HON. JOHN FEIKENS, Chief Judge

Excerpts From DEFENDANT'S PARTIAL OBJECTIONS AND PARTIAL ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

[Filed September 28, 1982]

NOW COMES the defendant, by counsel, and makes partial objections and partial answers to plaintiff's First Set of Interrogatories as follows:

• • •

INTERROGATORY NO. 5

State the reason why Plaintiff Scott E. Ewing was not permitted to retake the National Board of Medical Examiners Part I test after failing to achieve a passing grade on only the June, 1981, session of the test.

ANSWER TO INTERROGATORY NO. 5

In reviewing plaintiff's overall record, the Inteflex Promotion Board warned Mr. Ewing, and restated such warn-

ing after a subsequent review, that if he received any more deficiencies he would be dropped. Mr. Ewing then took the NBME Part I test and received a grade of 235, which was the lowest grade for his entire class and one of the lowest grades in the history of the Medical School. A score of 235, when a passing score was 345, clearly was a deficiency and the Inteflex Promotion Board thus exercised its previous warning and dropped plaintiff from the Medical School.

• • •

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
ANN ARBOR

No. 82-60271

SCOTT E. EWING,
Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Defendant.

HON. JOHN FEIKENS, Chief Judge

Excerpts From MEMORANDUM BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF PRELIMINARY INJUNCTION

[Filed October 14, 1982]

• • •

[p. 11]

• • • Because the defendants have interposed the defense that the Eleventh Amendment prevents recovery of money damages, the only relief which plaintiff can obtain if he is successful is equitable.

• • •

[pp. 30-31]

If defendant University is found to be liable to plaintiff and is also unsuccessful in sustaining its defense of Eleventh Amendment immunity from damages, plaintiff will have adequate remedies at law. He can be compensated for time spent in review, or even for review tutorial ex-

penses. There are reasonable bases for calculating income he has lost during the time he has not been a medical doctor. The "personal reward" he has missed is no more speculative and no less susceptible of measurement than any other kind of "mental anguish" element of personal injury.

If defendant University is found to be liable even though it is protected by the Eleventh Amendment, plaintiff will enjoy the favor of equitable remedies less drastic than that prayed for in this Motion. The University could then be made to provide him with needed tutorial services to assist him in his review or to assist him in finding employment beyond his normal expectations.

• • •

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
ANN ARBOR

No. 82-60271

JURY TRIAL DEMANDED

SCOTT E. EWING,
Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Defendant.

HON. JOHN FEIKENS, Chief Judge

Excerpts From AMENDED COMPLAINT

[Filed November 15, 1982]

Plaintiff Scott E. Ewing, by his attorneys, complains against Defendant Board of Regents of the University of Michigan and alleges as follows:

• • •

1. Plaintiff Scott E. Ewing ("Ewing") is a citizen of the State of California with his permanent residence address at 4 Admiralty Cross, Coronado, California 92118. Ewing temporarily resides at 1320 Wisteria, Apartment B-4612, Ann Arbor, Michigan. Until dismissed, Ewing attended the University of Michigan Medical School as an out-of-state resident.

2. Defendant Board of Regents of the University of Michigan ("Board of Regents") is a body corporate existing pursuant to § 15.904, Michigan Statutes Annotated ("M.S.A."). By statute, § 15.903 M.S.A., the Board of Regents is vested with the authority to govern the University of Michigan ("University"), including the University of

Michigan Medical School ("Medical School"). The Board of Regents is legally responsible for the acts and omissions of the University and the Medical School, which act pursuant to authority granted to them by the Board of Regents.

• • •

9. Between the fall of 1975, and June 1981, Ewing completed successfully two-thirds of the Inteflex Program with a 2.8 (B–) average, having taken an authorized leave of absence from the Inteflex Program for a portion of the period. A 2.0 (C) average constitutes satisfactory academic standing.

10. As of June 1981, Ewing was a student in good standing in both the Inteflex Program and the Medical School. (Copies of Ewing's official transcripts are attached hereto and incorporated herein as Exhibit A.)

• • •

14. The Board of Regents, through the Medical School, at the time that Ewing took the NBME Part I, had a long-standing policy, practice and custom to permit any enrolled medical student to take the NBME Part I examination on at least two occasions. Only if a medical student failed the the NBME Part I at least twice would academic dismissal of the student be considered.

15. The Medical School's practice, policy and custom is exemplified by a memorandum issued by its Associate Dean which states the policy of permitting three opportunities to pass the NBME Part I prior to action resulting in dismissal. (A copy of the memorandum is attached hereto and incorporated herein as Exhibit B).

16. The policy of permitting retests of the NBME Part I is also stated in the Medical School's official publication, the *Medical Center Report*:

> . . . everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board exams. Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam. ("On Becoming a Doctor," *Medical Center Report,* Special Issue, copyright 1981, University of Michigan, p. 30 attached hereto and incorporated herein as Exhibit C.)

17. In addition, on information and belief, the Medical School, during the period Ewing has been enrolled as a student in Inteflex, has permitted enrolled medical students a second opportunity, or even a third opportunity, to take the NBME Part I.

18. The Medical School's policy is consistent with the policy of the National Board of Medical Examiners, which prescribes that students should be given three opportunities to pass the NBME Part I.

• • •

20. Despite the existing practice, custom and policy of the Board of Regents, acting through the Medical School, to allow a medical student to retake the NBME Part I at least once, and despite the oral assurance of Dr. Reed, the Inteflex Promotion and Review Board—consisting of members of the Medical School faculty and chaired by Dr. Reed—in July 1981, removed Ewing immediately from enrollment in the Inteflex Program.

• • •

22. Under Michigan law, Ewing enjoys a property right and interest in his continued enrollment in the Inteflex Program, which would culminate in his attainment of the M.D. degree. Ewing's protectible property interest in continued enrollment pursuant to the terms and conditions of the Inteflex Program is created, at least in part, by the Medical School's guidelines, policy and practice (as exemplified in Exhibits B and C attached hereto) that any medical student

would be entitled to, at least, one retest of the NBME Part I prior to action resulting in academic dismissal.

• • •

25. The Board of Regent's actions are arbitrary and capricious since (i) they were contrary to the Medical School's policy and (ii) Ewing was offered less favorable treatment than that provided for other similarly-situated Medical School students. This conduct is in violation of Ewing's substantive due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. It also constitutes a violation of 42 U.S.C. § 1983.

• • •

55. Ewing has a contractual relationship with the University. This contract entitles Ewing to remain enrolled in and to pursue studies in the Inteflex Program in accordance with all the terms and conditions of the Program, including the material term that a medical student has the right to a retest, if he or she fails the NBME Part I on a single occasion. The contract is embodied in the written catalog, brochures, policy memoranda and publications of the University, including specifically Exhibit C.

• • •

116. In deciding to take the NBME Part I examination in June 1981, Ewing relied, to his detriment, upon the stated policy, practice and custom of the Board of Regents, acting through the Medical School, that a single failure of the test was not grounds for academic dismissal.

117. Prior to taking the NBME Part I examination, Professor La Du of the Medical School told Ewing that students are permitted to take an NBME Part I retest after a single failure.

• • •

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
ANN ARBOR

No. 82-60271

SCOTT E. EWING,
Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
a Michigan Constitutional Corporation,
Defendant.

HON. JOHN FEIKENS, Chief Judge

Excerpts From ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

[Filed November 30, 1982]

NOW COMES defendant, BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, a Michigan Constitutional corporation, by counsel, and, for purposes of this action only and for its answer by like-numbered paragraphs to plaintiff's four count Amended Complaint, respectfully represents to the Court that:

• • •

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of the plaintiff's current State of citizenship, his permanent residence address, or his temporary residence address. The defendant admits that, until he was dismissed for academic insufficiencies, the plaintiff attended the University of Michigan Medical School as an out-of-state resident.

2. Defendant denies that it is a body corporate existing pursuant to § 15.904, Michigan Statutes Annotated (M.S.A.), § 390.4, Michigan Compiled Laws Annotated (M.C.L.A.) if by the use of the language "existing pursuant to", plaintiff wishes to allege that this statute is the sole source of the Regents' authority. The Board of Regents of the University of Michigan is established under the Constitution of the State of Michigan. Mich. Const. 1963, Art. 8, §§ 4 and 5. The Board of Regents of the University of Michigan is a Constitutional corporation and not a legislative corporation. The Board of Regents derives its authority to administer and govern the University of Michigan from the aforementioned constitutional provisions.

• • •

9. Defendant admits that between the fall of 1975, and June 1981, plaintiff completed approximately two-thirds of the Inteflex Program with a grade-point average of approximately 2.75 on a 4.0 grading scale. Further answering, the defendant admits that the plaintiff took an authorized leave of absence from the Inteflex Program for a portion of the period, but said authorized leave of absence was granted after plaintiff was dismissed from the University of Michigan for insufficient academic performance. Plaintiff was readmitted to the University of Michigan after his explanation that he had suffered emotional difficulties was accepted. Plaintiff was allowed to take a leave of absence only after he was readmitted. Further answering, the defendant denies that a 2.0 (C) grade-point average is the sole measure of satisfactory standing. Students with grade-point averages above 2.0 can have conditionally satisfactory academic standing if they are on academic probation. Students are regularly put on strict academic probation if they have demonstrated an inability to pass required courses on first examination, or if they have exhibited other signs that indicate that they do not deserve unconditionally satisfactory academic standing. The defendant avers that the present plaintiff, by virtue of the fact that he consistently

failed required courses or final exams, was for the greater part of his tenure at the University of Michigan only on conditionally satisfactory academic standing.

10. Defendant denies that as of June 1981, plaintiff was a student in unconditionally good standing in both the Inteflex Program and the Medical School. Defendant further answers that the plaintiff's official transcripts are not the sole measure of plaintiff's academic standing at the University of Michigan.

• • •

14. Defendant denies that at the time plaintiff took the NBME, Part I, the Medical School of the University of Michigan had a long-standing policy, practice and custom to permit *any* enrolled medical student to take the NBME, Part I examination on at least two occasions. Defendant further denies that the Medical School would only consider dismissing medical students who had at least twice failed the NBME, Part I.

15. Defendant denies that Exhibit B, incorporated within the plaintiff's First Amended Complaint, exemplifies the Medical School's policy, practice, and custom in force at the time plaintiff was a student at the University of Michigan Medical School. Exhibit B bears the date of February 23, 1982, and plaintiff was dismissed from the University of Michigan in July, 1981. Further answering, defendant avers that the memorandum attached to the plaintiff's Amended Complaint as Exhibit B by its very terms is inapplicable to the class of medical students of which plaintiff had formerly been a member.

16. Defendant denies that the publication referred to as Exhibit C in the plaintiff's Amended Complaint is an "official publication" of the University of Michigan or of its Medical School. Further answering, defendant avers that the pages referred to as Exhibit C in the plaintiff's Amended Complaint are but two pages of a much larger

publication. Defendant denies that the publication referred to as Exhibit C can be taken in any way as an official statement of the policy of the University of Michigan and its Medical School.

17. Defendant admits that during the period plaintiff was enrolled as a student in the Inteflex Program, it allowed enrolled medical students who had unconditionally good academic standing but who had failed the first administration of the NBME, Part I to retake the examination.

18. On information and belief, defendant denies that the National Board of Medical Examiners has any policy which prescribes that medical students "should be given three opportunities to pass the NBME, Part I." The informational pamphlet of the National Board of Medical Examiners contains the following statement:

> In order to achieve a passing score in a Part, two reexaminations (i.e., three attempts to pass the Part), will ordinarily be permitted any examinee provided he or she continues to meet all eligibility requirements that are applicable for the Part. [Bulletin of Information and Description of National Board Examinations, 1982, Page 18.]

Further answering, defendant denies that its medical school has any policy which by mechanical application would grant to any medical student two or three oppportunities to pass the NBME, Part I.

• • •

20. Defendant admits that the Inteflex Promotion and Review Board, after carefully reviewing plaintiff's academic record at the University of Michigan, and after taking into consideration the fact that plaintiff failed the NBME, Part I while on strict academic probation, voted to remove plaintiff from enrollment in the Inteflex Program. Defendant denies that the actions of the Inteflex Promotion

and Review Board were in any way inconsistent with its existing practices, customs and policies. Further answering, the defendant denies that the actions of the Inteflex Promotion and Review Board were in any way inconsistent with any oral assurances which may have been given to plaintiff.

• • •

22. Defendant admits that, under Michigan law, plaintiff may have enjoyed a property right and interest in his continued enrollment in the Inteflex Program. However, defendant avers that whatever interest plaintiff may have in such continued enrollment in the Inteflex Program was subject to the condition that he meet the standards of the University of Michigan Medical School for adequate academic performance. Defendant denies that Exhibit B and Exhibit C, incorporated in plaintiff's Amended Complaint, in any way state the Medical School guidelines, policy or practice. For reasons which it has set out in paragraph 15 of this Answer, defendant denies that the memorandum contained in Exhibit B is in any way applicable to the present plaintiff. With respect to Exhibit C, defendant relies on its Answer set out in paragraph 16 above. Further answering, defendant denies that it has any guideline, policy, practice, or custom which would indiscriminately allow medical students who have failed NBME, Part I on the first administration to sit for a second administration. Any policy that the Medical School might have with respect to any opportunity to sit for a second administration of the NBME, Part I is not applied mechanically. The policies of the University of Michigan Medical School are administered in conjunction with assessments of the qualification and demonstrated performance of each student to the extent such is practicable.

• • •

25. Defendant denies that the Medical School has taken any action inconsistent with its policies, guidelines and

practices or that it has acted arbitrarily and capriciously with respect to plaintiff. The defendant further answers that plaintiff was treated with all due regard for his own circumstances, and that plaintiff is the only medical student in the history of the University of Michigan Medical School to have failed the NBME, Part I on the first administration while on strict academic probation. Because plaintiff was on strict academic probation, he is not entitled to compare himself to the others who were not on such probation when they failed the NBME, Part I. Defendant denies also that there has been any deprivation of plaintiff's constitutional rights or any violation of 42 USC 1983 with respect to plaintiff.

• • •

55. Defendant denies that it has any contractual relationship with the plaintiff in which a material term would be that plaintiff has an unconditional right to sit for a second administration of the NBME, Part I after he failed a first administration of said examination. Further answering, the defendant denies that any contract it may have had with plaintiff is in any way stated or modified in the pages set out as Exhibit C in the plaintiff's Amended Complaint.

• • •

116. For reasons set out in foregoing paragraphs of this Answer, defendant denies that it had any policy, practice, or custom such as that alleged in paragraph 116 of the plaintiff's Amended Complaint.

117. In answer to paragraph 117 of plaintiff's Amended Complaint, defendant avers that Professor La Du is in no way charged with promulgating the official policies of the University of Michigan Medical School and defendant denies that any statements or representations made by Professor La Du would be binding on defendant. Defendant further answers that since plaintiff, during his tenure at the University of Michigan and its Medical School, made frequent use of the established administrative committees

for disposition of his various applications and appeals, and since plaintiff knew that promotion and dismissal decisions are made only by committees, plaintiff is himself estopped to claim that he relied to his detriment on representations or predictions of administrative disposition made by an individual.

• • •

THIRD AFFIRMATIVE DEFENSE

(Defendant Not Subject To Suit Under 42 U.S.C. § 1983)

FOR AND AS its third affirmative defense to plaintiff's Amended Complaint, defendant avers that:

Neither the University of Michigan nor its Medical School and its officials acting in their official capacities is a "person" within the meaning of § 1983 of Title 42 of the United States Code, and the defendant is therefore, and otherwise, immune from any liability to the plaintiff on account of the matters alleged in his Complaint.

WHEREFORE, defendant prays that plaintiff's Amended Complaint be dismissed with prejudice, that defendant have judgment of no cause for action, together with costs and attorney fees most wrongfully sustained.

FOURTH AFFIRMATIVE DEFENSE

(Suit Barred By The Eleventh Amendment)

FOR AND AS its fourth affirmative defense to plaintiff's Amended Complaint, defendant avers that:

Both the University of Michigan and its Medical School are agencies of the State of Michigan within the meaning of the Eleventh Amendment to the Constitution of the United States and said Amendment bars plaintiff's action.

WHEREFORE, defendant prays that plaintiff's Amended Complaint be dismissed with prejudice, that defendant

have judgment of no cause for action, together with costs and attorney fees most wrongfully sustained.

FIFTH AFFIRMATIVE DEFENSE

(Academic And Professional Privilege)

FOR AND AS its fifth affirmative defense to plaintiff's Amended Complaint, defendant avers that:

Plaintiff was dismissed from the Medical School program for reasons of poor scholarship following his repeated failure of required courses, his failure to carry a regular academic load of courses, and his failure to achieve a passing grade on the NBME, Part I. The decisions of the faculty and committees of the Medical School with respect to the plaintiff were made in the exercise of valid teaching functions. These decisions were neither arbitrary nor capricious, and the defendant's academic, clinical and professional decisions should not be displaced by the decision of a Court.

WHEREFORE, defendant prays that plaintiff's Amended Complaint be dismissed with prejudice, that defendant have judgment of no cause for action, together with costs and attorney fees most wrongfully sustained.

• • •

RELEVANT PLEADINGS

United States Court of Appeals for the Sixth Circuit

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-1333

SCOTT E. EWING,
Plaintiff-Appellant,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division (Ann Arbor)

Excerpts From BRIEF FOR DEFENDANT-APPELLEE

[Filed November 28, 1983]

• • •

[p. 14]

• • •

• • • The Medical School faculty and administrators, acting as a whole and not as individuals, are best qualified and able to exercise that judgment and their judgment should not be supplanted by any Court absent a clear and convincing showing, which plaintiff cannot make, that the plaintiff was treated in an arbitrary and capricious manner.

• • •

[p. 23]

• • • The lowness of the score, however, was not the reason for his dismissal • • •.

• • •

PORTIONS OF TRANSCRIPTS OF TRIAL TESTIMONY, held on January 10, 1983 (designated as Tr. I), January 11, 1983 (Tr. II), January 12, 1983 (Tr. III), and January 14, 1983 (Suppl. Tr.)

JAMES A. TAREN, M.D.
(Professor of Neurosurgery and Associate Dean for Education Affairs)

• • •

[Tr. I, p. 27]

Q [DIRECT EXAMINATION BY MR. CONWAY] Is it correct that a student graduating through the Inteflex Program, and a student graduating from the Standard Program receives the same Doctor of Medicine degree from the University of Michigan?

A [DR. TAREN] That is correct.

• • •

[Tr. I, p. 60]

Q Are you aware on any occasion, between 1975 and 1982, of an instance in which a student failed the NBME Part I, was not given a retest, other than Mr. Ewing?

A No.

Q Is it true that Mr. Ewing is the only student at the University of Michigan, after failing the NBME Part I, was not given the opportunity to take it again?

A Yes.

• • •

[Tr. I, p. 64]

• • •

Q And my question to you is now: Under what aegis does the Executive Committee look at the same question, whether in this case whether Mr. Ewing was to be permitted to re-take the NBME Part I?

A The Executive Committee of the medical school is a —composed of an elected faculty from both the Basic Science and Clinical Science Departments to serve for specified times, and they are appointed by the Regents, and they consider, with the Dean of the medical school, for the faculty, many matters, including curriculum, educational policies and many other matters.

Q Does the Executive Committee have, within its jurisdiction, the authority to review the decision of the Promotion Board, regarding Mr. Ewing's not being permitted to retake the NBME Part I?

A The policies of the school, with regard to the Promotion Board are in the catalogue and state that as a part of the appeal process, that the Executive Committee is a part of the appeal process——

Q And——

A —of Promotion Board decisions.

Q And that was the function in which the Executive Committee was performing in the summer of 1982 when you were involved as a member of that Committee?

A Yes.

Mr. Ewing had appealed a decision of the Promotion Board to the Executive Committee on one previous occasion, at least, to my knowledge, and was re-appealing.

Q In the summer of 1982?

A Yes.

Q And am I correct, that the Promotion Board decided —pardon me, strike that.

Am I correct that the Executive Committee decided in the summer of 1982 not to permit Mr. Ewing to re-take the NBME Part I?

A Yes.

Q. And they decided not to permit Mr. Ewing to be enrolled in the University of Michigan Medical School; is that right?

A Yes.

• • •

[Tr. I, p. 66]

Q Am I correct that Mr. Ewing's dismissal from the University had nothing to do with any Honor Code issue or violation?

A That's correct.

• • •

[Tr. I, p. 82]

Q • • • With respect to Plaintiff's Exhibit 1 in evidence, which listed the Standard students, Dr. Taren, were any of the students who had the deficiencies listed there, Student Al had 5, so forth—were any of those students on Academic Warning at the time they took the NBME Part I?

A I can't answer that from this document.

The—a student may have received a letter that would imply if their performance wasn't satisfactory, they could be dismissed from school.

Q Of your own knowledge, you don't know whether any of the Standard students listed on Plaintiff's Exhibit I had such a warning at the time he took the NBME Part I?

A No, I'm not.

Q Regardless of that, if he took the NBME Part I and failed, they were not discharged; is that correct?

A That's correct.

Q So, whether they were on Academic Warning, they were not discharged; is that right?

A That's right.

• • •

Q Other than Mr. Ewing, you're not aware of any student who was discharged for failing the NBME Part I.

A Students have been discharged for failing the NBME Part I.

Q On the first occasion, Dr. Taren?

A You're correct, with that amendment.

• • •

[Tr. I, p. 83]

Q • • • Is it true a Promotion Board automatically has on its agenda, any student who has failed the NBME Part I, or who has had any course difficulty?

A I think the agenda of the Promotion Board would consist of any student who had unsatisfactory performance.

Q And, and that would include any student who failed the NBME Part I?

A Yes.

Q On the first occasion?

A Yes.

• • •

[Tr. I, p. 84]

Q Is it true, as to the Standard Promotion Board, every time it came up on the agenda of that board, that a student failed the NBME Part I on the first occasion, that student was permitted a re-test?

A I believe that's correct.

• • •

[Tr. I, p. 90]

Q Dr. Taren, I've given you a copy of Plaintiff's Exhibit 3 in evidence, which is a photocopy of a publication, entitled "On Becoming a Doctor."

Have you seen this document before?

A Yes.

Q And it makes reference, on the title page, to Medical Center Report; do you see that?

A Yes.

Q Do you know what the Medical Center Report is?

A Yes.

Q Is it a publication of the University of Michigan?

A It is a medical—a report of the Medical Center.

Q Let me—is it the Medical Center of the University of Michigan?

A It's part of the University of Michigan.

• • •

[Tr. I, p. 100]

Q [CROSS EXAMINATION BY MR. DAVIS] • • • Are there different Promotion Boards within the Medical School?

A Yes.

Q What Promotion Boards exist?

A There are, in the Standard Program, we had a Promotion and Interim Review Board existing at that time, existing in the Basic Science Phase and also the Clinical Phase.

The Promotion Boards, in the Inteflex Program are, there is a Promotion Board for the Phase I and I think for Phase II.

When the Inteflex students move on into the Clinical Phase of the curriculum, they come under the purview of the Clinical Phase Promotion Board.

Q What is the name of that Promotion Board?

A That's the Clinical Phase Interim and Review and Promotion Board.

Q Sometimes called Phase III Promotion Board?

A The Inteflex Board might refer to it that way.

Q But, I take it that that Board has jurisdiction over students only after both the Standard student and the Inteflex student passed the NBME Part I Examination?

A That's correct.

Q Up until they take and pass the examination, they're governed by separate Boards; is that correct?

A Yes.

• • •

[Tr. I, p. 114]

Q What does the—what is the function of the Promotion Board for the Standard student curriculum?

A The Promotion Board functions in several ways: It promotes students; it reviews academic performance; it also serves in a counseling sense.

It may recommend that students take remediation for unsatisfactory performance; can drop a student from recommendation—from registration.

Q Does the Promotion Board review the academic performance and progress of every student?

A Yes.

Q And does the Inteflex Promotion Board review the academic performance and progress of every Inteflex student?

A I believe they do.

Q Now, with reference to Plaintiff's Exhibit 3 which is this pamphlet "On Becoming A Doctor," what is your

understanding, Dr. Taren, as to the reference on page 30 by Dr. Gibson to students being allowed to sit a second time to take the NBME Part I if they fail it the first time?

• • •

[Tr. I, p. 115]

Q What was your understanding what he meant by the remark?

• • •

[Tr. I, p. 116]

A • • • This refers to medical students in the Standard Program, and it refers to students, I think, who are qualified.

Q • • • All right. You don't find the word Inteflex in that discussion at all, do you?

A No.

Q Now, is this an official catalogue or bulletin of the medical school, as far as you know?

A No.

• • •

[Tr. I, p. 119]

Q [REDIRECT EXAMINATION BY MR. CONWAY] You still have Plaintiff's Exhibit 3, On Becoming a Doctor, do you, Dr. Taren?

A Yes.

Q Is it true, there is no reference to the paragraph you refer to, to the word Standard; is that right, on page 30?

A That's right.

Q And aren't medical—aren't Inteflex students students in the medical school?

A At a point, yes.

Q And that point includes the point at which they're taking the NBME Part I?

A They're counted as medical students when they enter the Basic Science Phase.

Q That's, that's in their third year?

A That's right.

Q And so it's at the end of the fourth year they're taking the NBME Part I, is that correct, for the Inteflex student?

A That's correct.

A And the sentence, the publication says, "According to Dr. Gibson, everything possible is done to keep qualified medical students in the medical school," that would apply to Inteflex as well as Standard students would it not, the term qualified student in the medical school?

A Dr. Gibson did not work with the Inteflex Program. He was Assistant Dean for Student Affairs in the Standard Program.

• • •

[Tr. I, p. 126]

Q It's true, is it not, same subject matter covered in the Standard curriculum as covered in the Inteflex student at the time student from each of the program sits down to take the NBME Part I?

A Generally, yes.

• • •

[Tr. I, p. 132]

Q I referred you to the Plaintiff's Exhibit 3 which is the publication On Becoming a Doctor and on page 30, Mr. Davis asked you some questions about your interpretation of what Dean Gibson said; do you recall that?

A Yes.

Q And am I correct that your interpretation was that the re-test rule applied to qualified students?

A Yes.

Q Now, referring to Plaintiff's Exhibit 1, are all the students Standard students on that exhibit, the 32 students listed there who were given a re-test, were they all qualified students?

A Referring to the Standard students?

Q Yes, Dr. Taren.

A I believe so.

Q And that's true even though Student Al had five deficiencies out of ten?

A Yes.

Q And that's true even though student E2 had seven deficiencies out of the ten course?

A Yes.

Q And it would be true—if I went through each student, they would be qualified students under your interpretation?

A I believe so.

Q And is it your belief that the only student who was not qualified, who failed the NBME Part I was Scott Ewing?

A Yes.

• • •

[Tr. I, p. 136]

Q And it's true, was it not, Mr. Ewing was a medical school student and had reached the Phase I medical education?

A Yes.

Q And he became that student, approximately two years before he took the NBME Part I?

A I would say yes.

• • •

[Tr. I, p. 138]

Q [RECROSS EXAMINATION BY MR. DAVIS] Prior to preparation of this tabulation in connection with this lawsuit, Dr. Taren, have you ever had occasion to prepare such tabulations in the past?

A No.

Q Was it ever important to you to compare the academic deficiencies of the students in the Standard Program with the deficiencies of the students in the Inteflex Program?

A No.

• • •

[Tr. I, p. 139]

Q • • • Why was it not important?

A These were a separate group of students, if you will, comparing apples with oranges.

• • •

Q [EXAMINATION BY THE COURT] Dr. Taren, were you in any part of the group that wouldn't permit Mr. Ewing to take the NBME Part I test the second time?

A Not initially.

Q But at sometime, did you participate?

A Yes, I participated in discussions.

Q Prior to the time that the decision was made that he should not take the re-test?

A I participated only in the discussions at the time of the petition for re-entry into the medical school. That was at the Executive Committee meetings in July of 1982 and August of 1982.

The initial Executive Committee meeting which basically dropped him from registration, I did not participate in that decision. But, my advice was sought and I did participate in the petition on re-entry.

Q Would you tell me, then as regards the petition on re-entry, what your reasons are for not having voted to permit him to come back in?

A Sir, I did not vote.

Q Well, I use vote in a broad sense. I don't mean—I mean in a decisional way.

A Yes.

I know that the faculty of the medical school relies, heavily, on the process of the Promotion Board and internal review, interim review of students, and I rely on the judgments of the Course Directors who directly evaluated the students in the courses to give the grades, and then on the judgment exercised by those Promotion Boards and on the decisions they took.

• • •

ROBERT E. REED, M.D.
(Director of Inteflex Program and Senior Associate Dean)

• • •

[Tr. I, p. 148]

Q [DIRECT EXAMINATION BY MR. CONWAY] Do both the Inteflex and Standard student take the same NBME Part I Examination?

A [DR. REED] Yes.

Q And are they scored on the same scale?

A Yes.

• • •

[Tr. I, p. 156]

Q Deficiencies in the Standard curriculum courses are not taken any less seriously than they are in the Inteflex courses, are they?

A I don't believe so.

• • •

Q Did any other student, other than Scott Ewing who failed the NBME Part I on the first occasion, have an opportunity to re-take the first test?

A Yes.

Q Mr. Ewing was the only Inteflex student who was denied the opportunity to re-take the NBME Part I?

A The NBME Part I.

Q Am I reading the Inteflex student chart correctly, some students, at least one student was given more than one opportunity?

A Yes, one student.

• • •

[Tr. I, p. 157]

Q And am I correct, Mr. Ewing's failure of the NBME Part I precipitated his dismissal from the Medical School?

A Yes, it did.

Q Now, are you aware whether or not Mr. Ewing received honors grades in the Inteflex portion of his education?

A Yes; he received one.

• • •

[Tr. I, p. 158]

Q With respect to the other students listed on the Inteflex chart, did any of those receive any honors grade during their Inteflex careers?

A No.

Q Are you aware of any research published by any of the students listed on the Inteflex student sheet of Plaintiff's Exhibit 1?

A No, they did not.

Q Did Mr. Ewing do research?

A Mr. Ewing did research, and—which was published in abstract form.

Q Turning to the other seven students, none of them published research?

A No, not to my knowledge.

• • •

[Tr. I, p. 159]

Q Then it's correct that students routinely were given a second opportunity?

A They had been, yes.

Q Would it be correct, Dr. Reed, that it was the practice of the Medical School to allow a re-test?

A Again, I'm not sure of the use of the word practice. But yes, the document we've just reviewed shows that that was the common practice.

• • •

[Tr. I, p. 163]

Q So, would it be correct to say Plaintiff's Exhibit 3 was distributed on the campus of the University of Michigan about a week or so prior to the NBME Part I Examination, in which Mr. Ewing took and failed the test?

A Yes.

Q But for the failing of the NBME Part I, would Mr. Ewing have been promoted to the clinical phase of his Medical School education?

A Yes.

Q Dr. Reed, you heard Dr. Taren testify about the concept of academic warning, academic probation?

A Yes.

Q What's the right term, academic warning, is that the term that you use?

A I don't use that term, I simply use the word warning.

Q Is the concept of that warning embodied in any written document in the Medical School?

A No.

Q Is it embodied in any document of the Inteflex Program?

A No.

Q Is there any written standard to reflect when a student is to be placed on warning?

A No.

Q The Inteflex Program never promulgated any standard for such warning?

A No.

Q Is it true that the bulletins that Mr. Davis offered into evidence don't contain anything about the concept of warning?

A Not to my knowledge.

Q The course literature for the Inteflex Program at the Medical School doesn't reflect this concept of academic warning?

A No.

Q Are you aware of any University of Michigan policy that defines, explains the definition of academic warning?

A The only one is the currently adopted Medical School policy on promotions, which directs the Promotion Board to consider whether a student has several deficiencies, and decide whether or not they should be placed on such warning.

• • •

[Tr. I, p. 165]

Q • • • Do you now have Plaintiff's Exhibit 5?

A Yes.

Q Is that the policy to which you just referred?

A Yes.

Q Isn't it true that policy became effective in the summer of 1982?

A That's correct.

Q It did not replace any written policy of which you're aware?

A That's correct.

Q Was any document supplied to Mr. Ewing which would describe, for him, what the concept of an academic warning was by way of a bulletin, course literature——

A No——

Q —University policy?

A No.

• • •

[Tr. I, p. 167]

Q Are you familiar with the concept of an academic deficiency?

A Yes.

Q Is an academic deficiency when a student fails a course, and has to re-take that course?

A It's—academic deficiency exists when a student has an unsatisfactory performance in a course, and because of that, can't go on in the curriculum.

• • •

[Tr. I, p. 169]

Q The emphasis is on the word removed, was that deficiency removed?

A Yes.

• • •

[Tr. I, p. 173]

Q • • • If you'd look at Plaintiff's Exhibit No. 9, do you recognize that document?

A Yes.

• • •

[Tr. I, p. 174]

Q Is—the word removal is used in this letter, Dr. Reed?

A Yes.

Q Is that the terminology used by the Promotion Board in dealing with deficiencies that have been remedied?

A Yes.

Q Did you, at any time, convey to Mr. Ewing that, in fact, this Neuroscience deficiency was not removed from his record, in your opinion?

A No.

Q Did you, in your own opinion, consider the Neuroscience make-up exam was to be put behind him, or did you consider it for Mr. Ewing after the NBME Part I?

A He passed that course and was going on with the Program.

Q He had not had a deficiency on the record?

A That's correct.

• • •

[Tr. I, p. 178]

Q Looking first—Plaintiff's Exhibit 6 indicates Mr. Ewing passed the courses required of him in the Inteflex Program up to the time he took the NBME?

A That's correct.

• • •

[Tr. I, p. 184]

Q Am I correctly paraphrasing the policy, the Promotion Board will review any student's performance after several deficiencies, and it's up to the Promotion Board whether the student will be warned?

A That's right.

• • •

Q Am I correct Mr. Ewing was the only student ever placed on academic warning after a single academic deficiency in the period 1975-1982?

A Yes.

Q Was it unusual to give a warning after a single deficiency?

A Yes.

Q And didn't you tell that to the Promotion Board?

A Yes.

• • •

[Tr. I, p. 188]

Q Am I correct, Mr. Ewing in the Inteflex Program, was only the person to publish research, was also the party that failed NBME Part I?

A Yes.

• • •

[Tr. I, p. 198]

Q Final sentence, it says Mr. Ewing has always acted "... [i]n a manner befitting a medical student and future physician? Is that also true?

A In his interactions with me, yes.

Q And you had very extensive interactions with him, didn't you?

A Yes.

Q You were head of the Inteflex Program?

A Yes.

Q You reviewed his Program every time it came up?

A Yes.

Q Would it be correct to say you had more contact with him than anyone else?

A Only the counselors had more, yes.

Q You were the senior person having extensive contacts with him?

A That's correct.

• • •

[Tr. I, p. 204]

Q You were present at their deliberation and so forth?

A Yes.

Q Then with respect to both the Promotion Board and the Executive Committee, is it true Mr. Ewing personality, psychological make-up and the like served, in no way, as the basis for the action of those Boards in dismissing him from the Inteflex Program?

A You say during the dismissal process, yes.

At the time he re-applied for re-admission, however, his academic record wasn't the major thing in that he was going to come back to the Medical School.

At the time and others, he introduced evidence about his character, abilities and so on. So, I would say particularly at the last Executive Committee meeting, other factors were discussed, yes.

Q They were not in any way, however, a factor whether he should be dismissed in the first place; is that right?

A Initial dismissal, no.

Q Initial dismissal, July '81 dismissal and Executive Committee review in August, 1981; is that right?

A Yes.

Q And those were the dismissals that, in fact, put Mr. Ewing out of the Program; is that right?

A Yes.

Q The 1982 events were simply his efforts to get back into the Program; is that right?

A That's correct.

Q And is it true, you do not consider Mr. Ewing to be unfit to be a doctor from the point of view of his attitude, personality or moral character?

A No.

Q You agree with me?

A Yes, I said.

Q And is it true Mr. Ewing has the intellectual ability to be a doctor?

A I believe he's demonstrated that on several occasions, yes.

• • •

[Tr. I, p. 208]

Q• • • In your opinion, is Dr. Gibson's statement that—on page 30, ". . . [a]n opportunity is provided to make up the failure in a second exam" a correct statement of what the University's practice was in 1981?

A Yes, I believe if you interpret it as I would, I would agree with it.

Q Interpreting it as you would means qualified student; is that right?

A That's correct.

Q Is it your belief everyone listed in Plaintiff's Exhibit No. 1, the 32 Standard and 7 Inteflex students were qualified students?

A Determined so by the Promotion Board, yes.

Q Mr. Ewing was only the student determined not to be qualified; is that right?

A That's right.

Q As far as you know, in the history of Inteflex insofar as taking the NBME Part I?

A Yes.

• • •

[Tr. I, p. 216]

Q [CROSS EXAMINATION BY MR. DAVIS] Dr. Reed, Mr. Ewing's score on the NBME Part I was 245, is that right?

A That's right, I believe so.

Q That was lowest score in his class?

A Yes.

Q And, in fact, the lowest score in the history of the Inteflex Program?

A Yes.

• • •

[Tr. II, p. 10]

Q It would appear he took susbtantially one hard science course per semester; is that correct?

A That's correct, as we use the term hard science, the standard pre-medical sciences.

Q Was that typical for an Inteflex student?

A No.

• • •

[Tr. II, p. 11]

Q What is the importance of taking more than one hard science course at a time?

A It requires, in order to take them at one time, it requires extra effort of focusing efforts and usually considered by Boards as evidence of ability to do just that. Boards regularly express concern if students have not performed at that level.

• • •

[Tr. II, p. 14]

Q What had his performance been on completing courses on time?

• • •

A In the first year, completed six courses; only two on time.

• • •

[Tr. II, p. 41]

Q Who attended that meeting [of July 24, 1981] of the Promotion and Review Board?

A Drs. French, Friedman, Gershowitz, Glover, Jones, Schnitzer, Youel and Zweifler.

Q Do you know whether those members of Promotion Board had any personal familiarity with Mr. Ewing?

A They did—had all been instructors with the possible exception of Dr. Glover in courses that Mr. Ewing had taken.

Dr. French was the one who taught Human Illness; Dr. Friedman taught Microanatomy and General Pathology; Dr. Gershowitz did Genetics, both taught Developmental Anatomy and Neuroscience courses.

Now, Dr. Jones in Microbiology, Dr. Schnitzer, the Pathology portion of Human Illness; Drs. Youel and Zweifler, both in Clinical Studies.

• • •

[Tr. II, p. 24]

Q How much time was spent on reviewing information that week?

A I—the Board meeting lasted, according to the minutes, an hour and a half. I think the bulk of the meeting taken up by Mr. Ewing.

The other items on the agenda were fairly routine.

Q Did they look at the entire docket on review?

A Yes.

Q Did they look at extenuating circumstances which might suggest that he should not be dropped?

A Yes.

That's the main—that's the function of that Board meeting, where the student is in that position.

Q Did the Board find anything?

A No.

Q Was the decision, at that meeting to drop, a unanimous or split decision?

A Unanimous, sir.

• • •

[Tr. II, p. 55]

Q You responded to Mr. Conway yesterday that Mr. Ewing's personality was not the cause of his being dropped from the Program?

A That's correct.

Q Was his personality or any facet of his emotional makeup at all relevant as far as the Board was concerned, for other purposes?

A Yes, very much so.

Q What was it?

A In deciding what stipulations and requirements the Board should place on Mr. Ewing in making up deficiencies and continuing through the curriculum.

Q Did the Board consider such matters with regard to other Inteflex or Standard Program students?

A Yes.

Q With what degree of frequency did the Board consider the matter?

A Almost every student—not almost every, but the majority of students that came before it.

• • •

[Tr. II, p. 58]

Q How did this inability to cope with the stress of the Inteflex Program manifest itself in Mr. Ewing, as you were able to observe?

A By inability to complete work on time; inability to accept a decision made by administrators or faculty and unsatisfactory performance in courses, and a whole series of evidence of interaction with staff and faculty that were considered by them not appropriate, not what a Standard student would do.

Q Do you find students who are unable to cope with stress receive more incomplete grades than others?

• • •

A • • • My answer is: yes, I do.

• • •

[Tr. II, p. 59]

Q Can you compare Mr. Ewing receiving an incomplete, getting an incomplete without mentioning other students' names?

A He had more than most than if not all.

Q What about inability to deal with stress which was being absent from class or an exam? Do you know if that was a problem with him?

A Yes, it was.

Q How serious a problem was that?

A It was rated quite serious by a number of instructors

who were concerned that even though his performance in class was unsatisfactory, he had not responded to counseling, coming to class more regularly or seeking help and that was viewed as a very serious matter.

Q Did the Promotion Board review that as a serious matter?

A Yes.

Q Were any of those problems discussed before Mr. Ewing was placed on Warning before he was sent the Warning Letter?

A Yes.

• • •

[Tr. II, p. 63]

Q In your opinion and judgment, should have been allowed to have opportunity to take the re-test?

A No.

• • •

[Tr. II, p. 72]

Q You had a meeting with Mr. Ewing following failing the NBME Part I that's established that you didn't think the Board would drop him?

A That's correct.

Q Do you recall why it is you might have said that, if you said that?

• • •

[Tr. II, p. 73]

A I think I can explain it in context of the meeting.

Scott came to the meeting obviously upset about the score, worried about it, his future in the Program. We discussed the fact that he would not, under the circumstances, start the clinical rotations which would come up within a week, and discussed that he should go to the Standard office and

make plans to change his schedule so they would know he wasn't going to appear.

Scott then asked me if I thought the Board, if I recall, if I thought the Board would drop him.

That moment, without his record in hand, in an unhappy discussion, I believe my reaction, the Board might consider the extenuating circumstances that Scott had described to me and give him another chance, and I answered in that light.

• • •

[Tr. II, p. 79]

Q Could you use that [Defendant's Exhibit 43] to quickly highlight how Mr. Ewing compared with the typical Inteflex student, to the point where he took the NBME Part I Examination?

A Yes.

Going through the Inteflex curriculum, the first semester, he was virtually identical except for more numbers of hours. In the winter term, first year, the standard or typical Inteflex student would have taken physics; Mr. Ewing did not.

Then, the first month of the spring term of that same year when the typical Inteflex student would have taken the Introduction to Patient Care course, Mr. Ewing was completing the work on the incomplete, on the works we discussed.

The next fall, he was on leave.

The second winter term, he was taking the courses of the first year winter term. So, at that point, was a year behind.

He entered the second year of the curriculum, then, with a year's gap in between and in the third—his third year, fall of the third year in the curriculum, he had the failure in Microanatomy and General Pathology and so dropped another year behind.

His winter term of the second year was the same as the typical Inteflex student except the bottom line on the elective that semester, he did not take an elective.

The spring term, that year, was the standard, or typical Inteflex curriculum.

In the third year of the Program, he took the typical fall term with the exception that he did not take electives which are listed at the bottom.

In the winter term of that year, as I mentioned, he took one elective rather than the typical two, and then spring term of that third year, he only took the Clinical Studies course; did not take the other two courses.

Then came back in the next calendar year and took the Microscopic Anatomy and General Pathology course with L S & A electives and then took the spring term of the two hard science courses without the Clinical Studies course because he had already taken that.

Then the fourth year of the curriculum, he took the full curriculum as described here; that being the first year in which he took, throughout the year, the same curriculum that a typical Inteflex student would take

• • •

[Tr. II, p. 81]

Q I take it however, some of his classmates, however, were terminated from the Program?

A Yes.

Q Some, before taking the NBME, in fact?

A Yes, several in fact.

Q What is the importance of students being able to go straight through, put this all together and keep on track and on time and on schedule, as far as the Promotion Board is concerned?

A Promotion Board considers it a very serious matter that students demonstrate that they can put it all together, as you word it.

Q What, if any, relevancy does that have to the ability to practice medicine after getting the M.D. degree?

A Promotion Board, it's very relevant.

• • •

[Tr. II, p. 82]

Q [If] You had an opportunity to vote in this case, how would you have voted?

A I would have voted as other members of the Board, to drop his registration.

Q Why not let him take the exam, what's the harm in that?

A The harm, the student would then take the examination with the possibility passing it and moving forward, having been found to be unqualified by our Promotion Board System.

It focuses on the examination, and I have testified that's the proximate cause. But it's similar to the proverbial straw.

You ask me did the straw break the camel's back; the answer is yes, but not by itself.

The Promotion Board, as I have said, at several meetings, indicated that Mr. Ewing to demonstrate that the problems, whatever they were that led to his performance, had been removed, and that he was now ready to go forward.

They stipulated what he must do, which is complete the remainder of Phase II of the Program without deficiencies, he did not do so.

The Board reviewed, very carefully on two occasion, his record and found no extenuating circumstances. Therefore, he did not demonstrate that he was qualified to go on.

The Board looked at the possibility of him taking the examination, again, to demonstrate qualifications and decided that that would not do it; that they had required he do it in a specified period of time and manner, and he did not meet that qualification.

My judgment is, then, that that is evidence whatever the problems were that led to the previous difficulties had not been removed, and that he is not qualified to go forward, and simply passing the Board Examination does not, then, make him qualified.

• • •

[Tr. II, p. 90]

Q [REDIRECT EXAMINATION BY MR. CONWAY] Is there anything else in Defendant's Exhibit 14 you know to be false?

A I don't believe so.

Q All right. Let's look at the Backer Cards. Are you familiar with the Backer Cards, Dr. Reed?

A Yes.

Q Backer Cards counselors write up, you rely on?

A Notes of counselors' meetings, yes.

Q And you testified you rely on these things?

A Yes.

Q All right. If you look at last entry Backer Card July '81—it's Page 5 of the Backer Card. Do you have that entry before you, Dr. Reed?

A Yes, I do.

Q Do you see the entry indicating that in July, of 1981,

the "Promotion Board voted to drop Scott Ewing from registration on two accounts," and the second one says "failure to complete two years work in three calendar years". Do you see that?

A Yes.

Q Is that entry true or false?

A That's false. I covered that in my deposition.

Q You didn't cover—you didn't indicate that to Mr. Davis when you covered the Backer Card here in court.

A I was—that was not questioned, I don't believe.

Q Was anything else false in Exhibit 14?

A I would have to look back through my deposition. Several things in here were questioned at the deposition, and I agreed there were inaccuracies at that time. Other than that, I don't believe so.

Q Do you have them in mind, Dr. Reed?

A I don't, right at the tip of my tongue.

Q Well, for example, the reference on the Backer Card number two, on the back, about Mr. Ewing being dropped from registration, and that being an erroneous drop from registration from L S & A, do you remember if that was true or false?

A That it was erroneous?

Q Yes, sir.

A Yes, it was.

• • •

[Tr. II, p. 102]

Q So, is it true everything Mr. Davis asked you, from 1975 up to 1979 did not constitute an academic deficiency as used by the Inteflex Promotion Board?

A Yes.

• • •

[Tr. II, p. 104]

Q • • • Am I correct, then, Mr. Ewing had no outstanding deficiency when he took the NBME Part I?

A That's correct.

Q Was Mr. Ewing a qualified medical student at the time he took the NBME Part I?

A Yes; he was in good standing, at that time.

Q You were asked, by Mr. Davis, about Plaintiff's Exhibit 3; do you recall this booklet?

A Yes.

Q Do you recall the quote of Dr. Gibson with respect "every qualified medical student" being given an opportunity to make up a failure in a second exam?

A Yes.

Q And at the time Mr. Ewing took that exam, he was a qualified medical student, was he not?

A At the time he entered the examination, yes.

• • •

[Tr. II, p. 108]

Q After your—all your answers to Mr. Davis' questions, is it still true, the sole grounds for dismissing Mr. Ewing were academic ones?

A Yes.

Q And weren't psychological, personality, moral, attitudinal——

A Those other things——

Q —for dismissing him?

A The final act of dismissing was failure of the National Boards.

Q But for failing that, he would not have been dismissed?

A That is correct.

• • •

SCOTT E. EWING (Plaintiff)

[Tr. II, p. 125]

Q [DIRECT EXAMINATION BY MR. CONWAY] What did you understand that to mean when you received it?

A [MR. EWING] That the deficiency had been removed.

Q Did Dr. Reed ever indicate anything contrary to what's said in Plaintiff's Exhibit 9, that the deficiency was removed from your record?

A Anything contrary to this?

Q Yes.

A No.

• • •

[Tr. II, p. 134]

Q Did either you or Dr. Reed allude to the question of whether this failure of the NBME would result in adverse action by the Promotion Board?

A Yes; I broached the subject.

Q What did you say to Dr. Reed on the subject?

A I wanted to know whether this failure would result in my dismissal.

Q And what did Dr. Reed say to you?

A He said no, it would not.

• • •

[Tr. III, p. 59]

Q [CROSS EXAMINATION BY MR. DAVIS] You would agree with me, would you not, among the fair inter-

pretation of Dr. Gibson's language on Page 30 of that pamphlet, only qualified student would be allowed to repeat the NBME Part I Examination?

A [MR. EWING] I think that that is a possible interpretation of it, yes.

• • •

[Tr. III, p. 61]

Q Is it not a fair interpretation of that language, one of the fair interpretations that Dr. Gibson has reference to qualified students?

A Yes, Dr. Gibson has referred to qualified students.

• • •

[Tr. III, p. 63]

Q Do you have any recollection of Professor Friedman asking you if you knew of the seriousness of the warnings?

A I believe he asked me for the interpretation of the meaning of those letters.

Q All right, and you said you knew the seriousness of the warnings, didn't you?

A No, I did not.

Q What did you say?

A Well, I sent a letter shortly after this on August 26th, in which I pointed out exactly what I did say.

Q No, I want to know now——

A Okay——

Q —whether you recall saying in the meeting——

A Okay——

Q —July 31, 1981, in response to Dr. Friedman's question about the seriousness?

A Okay.

I said "I consider all examinations to be important, and that I do not take any course or examination lightly; but it had never been my understanding that a single failure of the National Board Examination would lead to my dismissal."

• • •

[Tr. III, p. 146]

Q [EXAMINATION BY THE COURT] Mr. Ewing, you heard the testimony of the Defendants that in their opinion you were not qualified as a medical student after you failed the NBME Part I test, did you not?

A Yes.

Q It is factual, is it not, the score that you attained on that test was it not the lowest as it has been testified, it was significantly low, was it not?

A Yes.

Q What, about that in your view, makes you feel that you have a basis for questioning the judgment of the medical faculty as to our qualifications?

A I think that on many occasion, have demonstrated——

Q No, only talking about the test score.

The position, as I understand the faculty are taking here, through the Promotion and Review Board here and the Executive Committee hearing, that while you were qualified to take the test, the NBME test before you took it, the test demonstrated, after you took it, you were not qualified?

A Uh-huh.

Q On what basis do you disagree with that decision in view of the score that you obtained on that test?

A Well, I would say most prominently in my most out-

standing performance in the medical school after I took it——

Q No, I'm only addressing the test itself .

A In that regard——

Q I take it——

THE COURT: Let me ask this so there is no question about it.

It is factual, is it not, that when Mr. Ewing took the NBME Part I Test, he was qualified to take it?

MR. DAVIS: That's correct.

THE COURT: At that time because the faculty felt he was qualified.

MR. DAVIS: Yes, in making up those deficiencies, yes, right.

THE COURT: Yes.

Q (By the Court): I'm not dealing, talking about the scores insofar as the Defense's position is concern.

The Defense's position is the score you obtained on the NBME Part I Test was so low indicates that you were not qualified.

A Right.

Q My question, considering that, what basis do you contend, looking at that score, that you were nonetheless, qualified?

A May I talk about what occurred after the exam while I was at the medical school?

Q No, no, please—I'm not talking about anything other than your test score.

What is it you find in your test score that leads you to

believe, notwithstanding that score, you were still, nonetheless, qualified as a medical student?

A Well, of course, I passed two out of the seven subject tests. I feel that a failing score is a failing score, regardless how low it is.

I have a hard time answering your question if I'm not allowed to——

Q But, it is a question, Mr. Ewing, I have to have an answer, and I need all the help I can get.

A Okay.

May I——

Q I have to find, if I sustained your position——

A Uh-huh——

Q —that you're qualified as a medical student.

A If I could have your indulgence in a minute?

After I took the NBME Part I and failed it, I, nevertheless, went on to clinical rotation which per se, it's my experience during the—what will occur during the final two years of medical school, and also when I'm out in practice and it was while on that rotation, and just before I was dismissed and after I took this exam, that I put in my most outstanding performance and I demonstrated there, I feel through the letters of evaluation about that performance, that I'm amply qualified to be a physician. That was the point, that was after I took the exam.

Furthermore, I think that it is obvious from most of my work that I, clearly, have the ability to pass that exam, and I think that the best way to resolve this issue is simply take the exam and see if I pass and if I don't, I'm willing to walk away and that's it.

Q Would you say if you didn't pass that would be clear

evidence that you weren't qualified, if you didn't pass a second time?

A I would be willing to stand by that, yes, without any further challenge or objection.

Q Why does that make you unwilling to stand by it the first time?

A Because no other student in the history of the medical school——

Q Not talking about medical school, talking about judgment the faculty made about your being in the medical school——

A Just brought out in my testimony, I was not adequately prepared, as well prepared as my classmates when I took the exam. If given similar preparatory time, I feel that I'll do just as well as my classmates.

Q What—the contention that you're making here in this lawsuit is that the decision of the faculty, in not permitting you to take the test a second time, is arbitrary?

A Yes.

Q And the question I'm trying to probe, what's it based on is the test score that you did obtain that makes their judgment questionable, looking just at the test scores?

A Well, I don't think that it's possible to simply isolate the test score and look at it. Because, no other instance, have they looked at a single test score.

Now, whether my score was so horrendously low or not——

Q Is this your position: Even though you may not be qualified, based upon the test score that you obtained, even though you may not be a qualified medical student in their judgment, you should nonetheless be permitted to take the

test a second time to show that you are qualified; is that your position?

A No.

I believe I have demonstrated that I'm a qualified medical student.

Q And you think that the test score does not arrogate against that view?

A No, I don't.

THE COURT: All right I have no further questions.

• • •

ROBERT E. REED, M.D. (Recalled)

[Tr. III, p. 159]

Q [REDIRECT EXAMINATION BY MR. CONWAY] Turn to Exhibit 52, Dr. Reed?

A [DR. REED] Yes.

Q Is it correct Mr. Ewing's the only Inteflex Student to be dismissed because he failed the NBME Part I?

A Yes.

Q And is it also correct that all the other students on this list were dismissed at an early stage of their Inteflex career prior to the giving of the NBME Part I?

A Yes.

Q So, Mr. Ewing, of all 20, was the one progressed the furtherest and only one who took the exam and failed it?

A I believe that's correct.

• • •

[Tr. III, p. 161]

Q [RECROSS EXAMINATION BY MR. DAVIS] How many students were dropped after suffering one deficiency and failing one grade after warning?

A There were several. You want me to count them?

A Yes.

A I believe there are nine.

The last two students resigned just before the Board met to drop them. There would be 11, I believe, if those were counted.

Q Are you the author of the Warning Letter?

A Yes.

Q Same kind of letter, language used in the Letters of Warning to Mr. Ewing?

A Yes.

Q Dr. Reed, none of the students received Warning Letters after a single deficiency?

A That's correct.

Q Mr. Ewing received a warning after one deficiency?

A That's correct.

• • •

BERT N. LA DU, M.D., Ph.D.
(Professor of Pharmacology)

[Tr. III, p. 177]

Q [DIRECT EXAMINATION BY MR. CONWAY] Was it your understanding, common understanding that the students got two shots to take the NBME Part I?

A [DR. LA DU] In the seven years I remember being on the Board for regular students, I couldn't remember a single student was not given a second chance if they needed it, in other words, if they hadn't passed the first time. So, it was my understanding if they hadn't passed the first time. So it was my understanding that was a practice.

• • •

[Tr. III, p. 182]

Q So that even with Mr. Ewing's score of 235, you believe under the existing practice, he should have been allowed to retake the exam?

A On that basis, yes, and as I mentioned, probably that was way below his real qualifications, academic qualifications. At times, I think circumstances, fear and panic, that probably lowered his score in the course of his examination below his real capacity to pass, to have passed the exam the first time.

• • •

K. M. JAIRAM MENON, Ph.D.
(Professor of Biological Chemistry)

[Tr. III, p. 229]

• • • [DR. MENON] I was the Director of Biochemistry course at that time.

Q [DIRECT EXAMINATION BY MR. DAVIS] Do you remember Scott Ewing?

A Very vividly, yes.

Q Why is it you say you remember him very vividly?

A Because we had some difficulties with him in terms of taking the exams on time.

Especially I remember one particular instance where I broke a date with my five year old daughter because—the exam was scheduled on a Friday and Scott said he couldn't take that exam. I asked him when could he take it, and he said he could take it on Saturday.

I said, "What time can you come to my office?"; said in the morning, ten o'clock or so. So, I waited at ten o'clock in my office.

I was in my office, and around 11:30, he showed up and he took the exam and then I was supposed to take my daughter for lunch on that day around one o'clock or so, and exam was not done.

So, I waited, and after giving him enough time, two hours or so, I asked Scott to turn in his exam and he started arguing with me, saying we didn't put any time limit on the exam for the students when they took it another time.

So, I told him it was an hour exam, "I already gave you more than two for the exam," and he, he said "I want more time." So, I let him write as long as he wanted.

Then he told me, in the conversation, that he was sup-

posed to be a good student, he was accepted at Harvard, and I remember him very well from that time on.

• • •

[Tr. III, p. 230]

Q Are you in any way biased against him?

A No, no. I wrote that he is a good student, and passed him in the course.

• • •

[Tr. III, p. 231]

A • • • I'm sure it's a passing grade, and I also wrote he was a good student. But, I said that, general impression at that time, was that the instructors, we thought Scott's attitude was such that the world owed him a living. That's what I wrote in my evaluation.

• • •

[Tr. III, p. 234]

Q Do you believe Mr. Ewing should be allowed to repeat the NBME Part I Examination?

• • •

A It looks pretty low in all the exams here; 220, 230, 265, 175. It looks pretty bad to me.

Q • • • You think he should be allowed to complete and go on to an M.D. degree?

A If you ask my opinion, no.

Q Why not?

A Because he doesn't seem to know that much of the basic sciences on the basis of this exam.

• • •

HENRY GERSHOWITZ, Ph.D.
(Professor of Human Genetics)

[Tr. III, p. 242]

Q [DIRECT EXAMINATION BY MR. DAVIS] And had you attended the meeting of the Promotion Board which met on July 24, which is Defendant's Exhibit 9, also in front of you?

A [DR. GERSHOWITZ] This was the meeting at which Mr. Ewing—the Board voted to drop Mr. Ewing, yes, I was in attendance at that meeting.

Q All right, and what was this vote at the meeting, July 24, where the Promotion Board voted to drop Mr. Ewing from registration?

A As I recall, the vote was unanimous.

Q How much time did the Board spend before voting, discussing Mr. Ewing's record at the medical school?

A I would guess it ran on the order between an hour and a half to two.

Q Let me ask you this: How much time have you spent dealing with Mr. Ewing's situation at the University of Michigan Medical School before this lawsuit was ever filed, before you ever heard of me and before this lawsuit was ever filed?

A Personally or——

Q Personally?

A Well, most of my time involving this case has been simply as a member of the Promotion Board, and that at Promotion Board meetings I would say Mr. Ewing has consumed, as an individual, perhaps a grand total between six and eight hours of the Promotion Board's time, which

involves many people sitting, spending a total eight to—six to eight hours. That's personal man hours.

• • •

[Tr. III, p. 247]

Q Dr. Gershowitz, do you have an opinion as to whether, from your advantage point as a member of the Promotion Board, and as a Professor of Human Genetics in the Inteflex Program, whether Mr. Ewing should be allowed re-test of the NBME?

A I do not believe he should be allowed.

Q Why not?

A A number of reasons: His academic record says he is marginal in the hard sciences; his academic record suggests a—which is not necessarily the ground for voting for rejection, suggests a personality problem; his record is replete with comments from various instructors about delays, seeking exceptions, seeking special circumstances and so on.

In addition to which the scores, on this one particular—I'm sorry, only one other point, indeed, he had been formally warned that another deficiency would cause—would be ground for his discharge, dismissal from the Program.

The NBME is, indeed, a formal requirement for promotion of the Inteflex Program. No student can be promoted without having passed that and, therefore, a failure in the NBME is, indeed, a formal failure or formal deficiency on the record. This was the second deficiency, and therefore he was subject to dismissal.

The scores, themselves, the large number of areas of the examination in which he failed suggested that the—any attempt by this student to try to overcome deficiencies in what was five out of the seven or some such numbers, that many areas at one time, would be almost certainly doomed to failure.

His weak background, his academic—weak science background, his very, very abysmally poor record on the exam said this was an exercise in futility, and the Board decided there was just no point to continuing this. No extenuating circumstance, there was no reason why we should seek to allow the student to go on again.

• • •

[Tr. III, p. 250]

Q [CROSS EXAMINATION BY MR. CONWAY] Were you aware, as you sat there, Mr. Ewing is the only student in the seven year history of Inteflex who has been denied a second chance to take the Boards?

A I was not aware of that.

Q Nobody told you that the past uniform practice had been to allow students to take a second chance, did they?

A No.

• • •

[Tr. III, p. 252]

Q What's the University's policy, today, as to how many times students can take the NBME Part I Examination?

A I believe it is two with regard to the Standard curriculum. I don't know that there is a flat policy with regard to the Inteflex Program.

Q Isn't there, in fact, a faculty resolution that says you get three tries?

A That's of recent origin, very recent.

Q So, that's the current policy, is it not?

A Yes, sir.

Q Prior to that the policy was two, was it not?

A I believe it was.

Q Are you aware that each of the deficiencies that Mr. Ewing had been given during his Inteflex term, had been formally removed by the Promotion Board?

A Yes.

Q And that he'd gotten letters removing the deficiencies from the Dean stating that?

A Yes.

• • •

BRUCE A. FRIEDMAN, M.D.
(Professor of Pathology)

[Tr. III, p. 262]

Q [DIRECT EXAMINATION BY MR. DAVIS] How familiar were you with Scott Ewing?

A [DR. FRIEDMAN] He was a bit of an enigma; weren't aware of his presence until we saw his very poor school mid-term examination at which point we were looking for him.

Q What do you mean his very poor school mid-term examination?

A We did know he had a name, very poor score, and looked at his picture, neither of us recognized him. Because we hadn't taken attendance, assumed he simply hadn't come to class.

Q How low was his score on the mid-term?

A I don't have the numbers before me. There were two scores, and it was, I think, low to mid-60's which we were very troubled by. We put out the word that we wanted to see him.

• • •

[Tr. III, p. 265]

Q And what was it you wanted said to Mr. Ewing?

A That we talk about his difficulties. Best of my knowledge, he was not attending class; thought he did a poor performance on the mid-term; thought he'd best pay more attention to the course if he would come to class and put his nose to the grindstone, as it were.

Q Did there come a time you gave a final examination in the course that Mr. Ewing took?

A Yes.

Q And what was his score?

A The score, as noted in this document, was 62 on the written and 63 in the practical.

Q Is there a mean score then for the entire course?

A We took the four elements, mid-term final—added the elements, the written and practical mid-terms and finals, and the overall cumulative average was 61.7.

Q How many students were in the course?

A I don't remember the exact number; somewhere near 45, 50, something like that where he ranked. He was at the bottom.

Q Dead last?

A Yes.

Q And this was half a semester after the counseling session?

A Yes.

• • •

[Tr. III, p. 268]

Q • • • Now what was Mr. Ewing's behavior or attitude, if you will, during any one of these meetings you had with him?

A Well, he would bombard us with reams of paper and these very elaborate beautifully written documents, pointing out our failings in terms of instructors, and where we had erred in our dealings with him, and he was also extremely articulate, no questions about that.

He made some very—he was very articulate in verbalizing what his attitude was about the course and his future in medicine.

• • •

[Tr. III, p. 272]

Q • • • Will you tell the Court—and you may use this

document if you wish to refresh your recollection, Doctor, what occurred at the meeting of July 31, 1981?

A We had an introductory session in which we reviewed, again, Scott's record. He then joined the Board; talked about his record, and he then responded to a number of questions and essentially was trying to make a case why this—he thought the action of the Board was inappropriate.

Q Did you put any questions to him?

A Yes. Having seen Scott over the years, he had a tendency, I think, to selectively screen out things that he thought were favorable to himself and manipulate details.

So, I wanted to establish, very much for the record, his perception of what the Warning Letter to him meant. So, I put it to him whether he clearly understood the seriousness of this issue, and that he could be dropped from the Program before he took the National Boards.

He responded affirmatively; in fact, his voice quivered. At that time, he said he was under the gun, and he understood full well the seriousness of the matter.

I wanted to establish very clearly we had a student who understood the severity of the decision.

Q Are you certain, as you sit here, he understood he failed the NBME on one occasion, that he would be dropped from registration?

A There was no question in my mind he understood the seriousness of this, and that this Warning Letter encompassed his performance, and if he did poorly, he would—he could be—he would be dropped from registration.

• • •

[Tr. III, p. 274]

Q How much discussion, timewise, had taken place on that occasion about Scott Ewing?

A Minute numbers, two hours, could have been three hours. This was a very belabored convoluted process.

Q Was he allowed to say anything he wanted to say in support of his position?

A Absolutely. He was given free—given total ability to say whatever he wanted. In fact, he commented at length.

Q Was he allowed to submit any document he wanted in support of his position?

A I believe so. Certain hospital documents were circulated; brought some other character records from clinicians.

Q How much time do you think you spent, officially on behalf of the medical school considering Scott Ewing's various petitions and so forth over the course of his registration at the University?

A Has to be more than a hundred, hundreds of hours of my personal time; perhaps more than that.

Q Have you spent anywhere near that amount of time with respect to any other student?

A No student approaches the time I spent on him.

• • •

[Tr. III, p. 276]

Q • • • What is your professional opinion and your opinion as a member of the medical school faculty and Promotion Board as to whether Mr. Ewing should be allowed an opportunity to repeat the NBME Part I Examination?

A I'm absolutely certain I think he should be dropped from registration, not be allowed to continue.

Q How about—can you be so absolutely certain, Dr. Friedman?

A First and foremost, he's not documented any proficiency, in the subjects taken; performance in the Boards merely culminates a series of deficiencies. I can't consider that an isolation, it's one of many deficiencies.

In many ways, it's the straw that broke the camel's back. It's absolutely an abysmal performance; in my opinion, unremedial.

Q Do you have personal animosity to Scott Ewing?

A No. I think he's a remarkable young man. I think he's intelligent, very facile, writes well, certain abilities are very impressive.

Q Do you think the State of Michigan should license him as a M.D.?

A I don't think so at all. I think he has certain qualities which will militate against him being a good physician.

Q What are those?

A Well, I think first of all, the way he approaches problems. I think he has certain sets of priorities and he converts his attention to projects he happens to be interested in.

Gets short—gets galvanized activity, he scrutinizes all documents before him, looks at what he perceives to be misrepresentations and suddenly there is this jury [flurry?] of activity.

Then Scott, somehow, causes the situation to be changed, somehow a deficiency to be erased, and he starts the whole process over again, and I think this would be a damaging kind of way to treat patients.

• • •

[Tr. III, p. 279]

Q [CROSS EXAMINATION BY MR. CONWAY] So, from a course point of view, there was nothing further

required of Mr. Ewing to go on to Phase III, leaving the NBME aside?

A From a course point of view? No, he would have progressed there had the National Boards not been there.

Q So, but for failing the National Boards, Mr. Ewing would have been promoted to Phase III; is that correct?

A If that was not a requirement, are you asking would he have gone ahead?

Q Assuming he had passed the NBME, he would have been promoted?

A Yes.

• • •

[Tr. III, p. 287]

Q I've handed Dr. Friedman Plaintiff's Exhibit 9 in evidence. It's a letter from Dean Reed to Mr. Ewing regarding the removal of a deficiency?

A Um-hmm.

Q Do you see that letter?

A Yes, um-hmm.

Q Is that the form of letter that the Promotion Board approves?

A Yes.

Q Does that letter, in any way, in its text, indicate to Mr. Ewing, though the deficiency was removed, it was still being held against him?

A No, it doesn't deal with that issue, no.

Q Does it indicate a Warning Letter previously issued was still in effect?

A No.

Q As a matter of fact, quite the contrary, says the deficiency was corrected and the deficiency was removed, doesn't it?

A Correct.

• • •

[Tr. III, p. 289]

Q After each letter, got another letter saying it was removed; isn't that right?

A Correct.

Q Each time he got one of those Warning Letters before—another Warning Letter, came, got an intervening letter saying that the deficiency is removed; is that correct?

A Correct.

Q Sat down for the NBME Part I, what was left was removed, and no deficiency outstanding; correct?

A Right.

• • •

[Tr. III, p. 291]

Q But, he was otherwise qualified? If he hadn't failed the NBME, he'd be promoted; isn't that right?

A That's correct.

• • •

[Tr. III, p. 295]

Q [RECROSS EXAMINATION BY MR. CONWAY] Dr. Friedman, Scott Ewing did not say, that Promotion Board meeting, that he knew a single failure would result in his dismissal, did he?

A I didn't think he used those words, no.

Q And he didn't say words to the effect, either, that a single failure would rule in his dismissal?

A I don't think he made that phrase, no.

• • •

RALPH M. GIBSON
(Professor of Psychology in the Department of Pediatrics and Assistant Dean for Student Affairs)

[Tr. III, p. 300]

Q [DIRECT EXAMINATION BY MR. DAVIS] You say, the quotation there about repeating the NBME Part I Examination:

> "According to Dr. Gibson, everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board exams. Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam."

In any of these remarks that are quoted or attributed to you in that section of the brochure, did you refer to Inteflex students?

A [DR. GIBSON] No.

Q Were you thinking about Inteflex Students?

A No.

Q What kind of students were you thinking about?

A The traditional student, again, the four year student.

This brochure was directed, primarily, to students around the country and this was, again, indicating that a qualified medical student is one who is considered by a particular Review or Promotion Board to be a student in good standing; namely a student who has passed the course work.

Q A student admitted to the Medical School Standard Program, or Inteflex, for that matter, as a qualified student, according to you, your judgment, they remain, they continue to stay qualified or can they become unqualified?

A If their performance is adequately—satisfactory.

Q If their performance is not satisfactory, then they would not be—according to your understanding, can an unqualified medical student take the NBME Examination?

A No.

• • •

[Tr. III, p. 303]

Q [CROSS EXAMINATION BY MR. CONWAY] Dr. Gibson, true, if Scott Ewing was a standard student, you knew the practice would be to get a second chance; is that right?

A I had no idea what his performance was.

Q You say standard, put on a leave of absence, put——

A If he had, at that point in time, been a student in good standing.

Q Do you have any reason to believe that the Inteflex treatment for a student who failed the NBME Part I has been different over the years?

A I have no knowledge.

Q One way or the other?

A That's right, I have no knowledge.

[Tr. III, p. 304]

Q Have you defined, qualified students to be, in your answer to Mr. Davis, a student who passed all course work?

A Student in good standing, right.

Q In defining that——

A That's right——

Q —for Mr. Davis, students passed the course work?

A Exactly.

Q In your definition, qualified student——

A To take the examination. That has been the policy of the Traditional Board.

Q So that if I—if a student had passed all course work, been a qualified student, he could take the NBME at least twice; is that right?

A Yes, um-hmm.

• • •

PORTIONS OF PLAINTIFF'S CLOSING ARGUMENT
(including dialogue with the Court)

[Suppl. Tr., p. 30]

THE COURT: I think I have to begin this inquiry with a determination, first, of what my power is, as a judge. I think *Horowitz* is instructive in that regard, is it not?

MR. CONWAY: Yes, it is, your Honor.

THE COURT: Now, if I understand the way that you set before me your propositions of law that apply, I find that you have really raised two questions: One of procedural due process and one of substantive due process.

There is little doubt in my mind that if this were a case, if this case presented a question of procedural due process, that I could deal with it; that is to say that I would have the power to deal with it.

My notion of procedural due process, in this kind of a frame of reference, would be if a medical student who is dismissed, let's say for engaging in the sale of heroin while enrolled in the Medical School and is charged with that, and then summarily dismissed before case came to trial or the truth of the allegations were proven beyond a reasonable doubt and without a hearing, was kicked out, that we would have a classic case of procedural due process.

In this case, even though I assume that, as you suggest, there is a property right or a contract right, you're not critical, are you, of the fact whatever the requirement, of the procedural process, the right to hearing, the right to appear before the faculty, the right that he was given to appear before the Promotion and Review Board initially and subsequently on appeal, that this satisfied any notion of procedural due process?

MR. CONWAY: Your Honor, we're not challenging the hearing. The only thing—and depends on the label your

Honor employs for it, it could be considered procedural due process, is that Mr. Ewing, we believe, was not on a level with anyone that failed.

THE COURT: He was given a hearing which is requisite.

MR. CONWAY: He was given a hearing which is requisite.

THE COURT: This is not a case of procedural——

MR. CONWAY: We have couched it as a substantive procedure——

THE COURT: When you get to substantive, no longer concerned with property right, liberty interest or contract rights. You're dealing with a different kind of situation, are you not?

If we're going to deal with susbtantive due process, we're going to be dealing with a question as to whether or not the medical faculty, through its committee, was arbitrary and capricious.

MR. CONWAY: That's the standard we all agree applies.

THE COURT: All right. So this is a substantive due process case?

MR. CONWAY: I agree with that.

THE COURT: Now let's look at *Horowitz* in that light. I don't know whether you have a copy of the text.

MR. CONWAY: Your Honor, I don't, I'm sorry.

THE COURT: I'm particularly interested in what the Supreme Court of the United States said about the substantive due process problem in *Horowitz*. They deal with it in a rather short paragraph, beginning at page 91 of Volume 435.

The Supreme Court said:

> "In reversing the District Court on procedural due process grounds, the Court of Appeals expressly failed to 'reach the substantive due process grounds advanced by Horowitz . . .' Respondent urges that we remand the cause to the Court of Appeals for consideration of this additional claim. In this regard, a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary and capricious.' "

Now I get into the point I think requires close scrutiny, continuing to read:

> "Even assuming that the courts can review——"

well the Supreme Court didn't say it can review, it said:

> "Even assuming that the courts can review under such a standard,"

that is, under the standard of substantive due process,

> "an academic decision of a public educational institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case."

Footnote seven:

> "Respondent alleges that the school applied more stringent standards in evaluating her performance than that of other students because of her sex, religion and physical appearance. The District Court, however, found: There was no evidence that [respondent] was in any manner evaluated differently from other students because of her sex or because of her religion. With regard to [respondent's] appearance, this in and of itself did not cause her to be evaluated differently than any other students."

That's the quote from the appellate record.

Back to the opinion of the Supreme Court.

> "Courts are particularly ill-equipped to evaluate academic performance. The factors discussed in Part II with respect to procedural due process, speak a fortiori; here and warn against any such judicial intrusion into academic decisionmaking."

What do suppose that sentence means?

MR. CONWAY: Your Honor, may I respond, I think what that sentence means, your Honor, would be ill-equipped to determine what is passing, or determining whether passes, could go on on the NBME. Your Honor would be ill-equipped to determine whether a question is wrong; your honor would be ill-equipped to determine pharmacology be included in the decision, or physiology.

Your Honor is ill-equipped because the role of the court has applied objective standards.

For example, as in the *Maitland* case, determine whether the score, the grade was added up right. And here, your Honor, I respectfully submit you're not in any way invading on any academic decision. If the question here, your Honor, would be, should there be one time or two times or three times, and—to take this test——and that was a new question and the University never spoken on that question, then it might be in the area of academic decision. Here, the University made the rule already; it said two times.

THE COURT: Let me narrow the point.

I took it down, I hope I took it down verbatim. If I haven't gotten the writing the way you said it, I want you to correct me.

You said, as you wound up your argument, "We are asking your Honor to decide that Ewing is qualified to take

the test, meaning the NBME. That's as I remember your argument; is that correct?

MR. CONWAY: That's our sentiment, your Honor—I can't tell if it's the exact wording.

THE COURT: You're asking me to determine whether Ewing is qualified to take the test.

MR. CONWAY: Within the meaning of Exhibit 3.

THE COURT: Doesn't that, doesn't that impact on this statement by Mr. Justice Rehnquist, to warn against any such judicial intrusion——

MR. CONWAY: No, Your Honor——

THE COURT: —into academic decisionmaking?

MR. CONWAY: No, your Honor.

The—Dean Gibson has set out what qualified is. Qualified——

THE COURT: I heard all of that argument. Don't give that to me again, Mr. Conway.

MR. CONWAY: Yes, sir.

THE COURT: I want—not interested in what Dean Gibson said——

MR. CONWAY: Yes, your Honor——

THE COURT: —I want to know what the Supreme Court meant.

MR. CONWAY: I don't believe that does intrude, because the answer here is an objective answer. It's on his transcript, on undisputed fact——

THE COURT: Let me go on and tell you why this is troublesome?

MR. CONWAY: Yes, your Honor.

THE COURT: And just after this sentence,

> "The factors discussed in Part II, with respect to procedural due process speak a fortiori here and warn against such judicial intrusion into academic decision-making,"

there is another footnote.

Footnote is applicable, it seems to me to the arguments that are being raised here.

> "Respondent also contends that petitioners failed to follow their own rules respecting evaluation of medical students and that this failure amounted to constitutional violation under *Service* v. *Dulles* 354 U.S. 363.
>
> We disagree with both respondent's factual and legal contentions,"

and I underline the word legal, because factually, there was a contest in the case as to whether or not Miss Horowitz was really being dismissed for academic deficiency or conduct for which she engaged as a person.

Continuing with the footnote:

> "As for the facts, the record clearly shows that the school followed its established rules, except where new rules had to be designed in an effort to further protect respondent, as with practical 'appeal' that petitioners allowed respondent to take. The District Court specifically found that 'the progress status of [respondent] in the medical school was evaluated in a manner similar to and consistent with the evaluation of other similarly situated students, with the exception that [respondent] docent . . . went to even greater lengths to assist [respondent] in an effort for her to obtain her MD degree, than he did for any of his other students."

Then comes this interesting sentence:

> "As for the legal conclusion that respondent draws," and that legal conclusion is the one that the court referred to earlier by saying it disagreed with both respondent's factual and legal contention, continuing,
>
> "[b]oth *Service*"—that's the case of *Service* v. *Dulles* —and *Accardi* v. *Shaughnessy* . . . "*Service* relied, enunciate principles of federal administrative law rather than of constitutional law binding upon the States."

Doesn't that footnote mean to say that even where you may have a situation in which the Medical School, in a decision with regard to the academic qualifications of a student does not follow its own rules, that is still no area for judicial intrusion?

MR. CONWAY: No, your Honor, I don't believe so. I think——

THE COURT: How else do you explain that language, then?

MR. CONWAY: Well, your Honor, first in the context obviously while the court's comment is as you read it, it made an earlier finding there was no factual difference——

THE COURT: And legal——

MR. CONWAY: I understand——

THE COURT: But when it said it was no legal basis, and said this was not a constitutional violation, was it saying that you can't make an argument that the medical faculty failed to follow its own rules when they are making decisions in the area of academics?

MR. CONWAY: Your Honor, I don't believe so, and the reason is——

THE COURT: Give me some reasons for not believing so.

MR. CONWAY: Yes, your Honor.

Because the nature of the relationship is that there is a contractual relationship here. They——

THE COURT: We're not dealing with contractual or property relationships now, we're not in procedural due process.

We're talking about whether or not a decision to drop a medical student, made by a faculty, can be arbitrary or capricious?

MR. CONWAY: Your Honor, if the broad meaning——

THE COURT: And if the difference is in the area of academic decisionmaking, doesn't *Horowitz* say, to the lower courts, "You'd better go very, very carefully there before you decide even if the faculty was wrong, even if the faculty was wrong, you'd better go very carefully before you decide to substitute your own judgment for that of the faculty"?

Isn't that what that says?

MR. CONWAY: Your Honor, as your Honor knows, the Standard of arbitrary and capricious is a high Standard and a difficult one to meet, and I think that that's how the court is telling the lower court to go easy. Because, your Honor, were it not so, then the court would need not have to assume that there could be a cause of action, and *Stevens* v. *Hunt*——

THE COURT: That's what *Stevens* said. You see, that's the interesting thing about it. They said even assuming that the courts can review under such a Standard, an academic decision.

Justice Rehnquist did not say we can review such a Standard. Said even if we assume that, there was no showing of arbitrariness and capriciousness.

Now, one of the concurring justices, I don't know, Mr. Justice Marshall—no, I think it was Mr. Justice White. But in any event, one of the justices who concurred, said, "Look, since the Circuit Court of Appeals never got to that issue, let's send it back, let them decide this."

You remember the court said they failed to reach a decision on that ground.

MR. CONWAY: Yes, your Honor.

THE COURT: What I'm really wondering is this: Can *Horowitz* be read to say that even if the faculty does not make the right decision, even if the faculty makes to us what would appear to be, obviously, a wrong decision where it is in the field of academic decisionmaking, there, we have to allow the faculty to make that decision. The courts cannot intrude even if it's dead wrong.

MR. CONWAY: Your Honor, I don't believe it can be read to say that.

• • •

[Suppl. Tr., p. 48]

[THE COURT] • • • Now let's assume, against that background for a moment, that *Horowitz* does not go as far as I suggested, and that it may not be read to say under all circumstances, no matter how wrong, if it's in the academic area and a faculty decides against a student, that's tough, but we'll support academia willy-nilly; whatever they decide, that's good enough, let's not go that far for a moment. Maybe *Horowitz* doesn't go that far, although the language is rather sweeping.

Supposing *Horowitz* is read to mean that if the faculty decides, in an individual student's case, that that student

is not qualified to be a medical doctor, that—if that decision is arrived at in some rational way, then it doesn't matter what that faculty decides is the situation as to any other medical student, even if it decides that differently as to 39 other students.

The nub of that particular point being, that what the faculty is doing is deciding, in each instance, the individual student's case, and that has no reference to any decision with regard to any other student's case. Each is decided on the merits of the individual's own case.

Now if, in making such a decision, the faculty says, "We do not believe under the totality of this particular student's circumstances, that this student is qualified to be a medical doctor, or to take a retest, or to continue as a student in good standing in this school, and there are some rationalities behind that decision," are you saying that federal judges can substitute judgment for medical faculties in that regard?

What expertise do I possess to do that?

MR. CONWAY: Your Honor——

THE COURT: I only know Mr. Ewing from having been here three days.

MR. CONWAY: Yes, your Honor, and I see——

THE COURT: Not here every day, and Dr. Reed, Dr. Taren, Dr. Gibson, Promotion and Review Board, Dr. Friedman—Dr. Friedman said he spent over 100 hours; I think Dr. Reed spent more time than that.

Certainly been a connection been the faculty and Mr. Ewing over the last seven years, and here are men who are at the head of a faculty and they make a decision that this man, under all of the circumstances, is not qualified, and they have some reason to support that, can I say, "No,

those reasons aren't any good, I'll substitute my own judgment for theirs"?

MR. CONWAY: Your Honor has posed many questions to me. If I can address them, if we were dealing as *Horowitz* dealt with a subjective academic decision, then I would agree with your Honor.

THE COURT: But aren't we dealing with that?

MR. CONWAY: No, dealing with objective standards.

THE COURT: No, no, you can't call a rose by another name here——

MR. CONWAY: Well, your Honor——

THE COURT: You said to me, "We are asking your Honor to decide that Ewing is qualified to take the NBME."

MR. CONWAY: Qualified under the standard they have promulgated.

THE COURT: Changed it a bit, but——

MR. CONWAY: We——

THE COURT: The question is one of academic decision-making, is it not? Qualifications meaning academically qualified?

MR. CONWAY: Academic——

THE COURT: He wasn't bounced out because of any other reason?

MR. CONWAY: That goes to the other point that your Honor said. Dr. Reed said——

THE COURT: You made a big point to show he was not thrown out because of his morals, he was not honorable person, or because of any psychiatric problem——

MR. CONWAY: Your Honor, I think——

THE COURT: —or any personality problem.

MR. CONWAY: Yes, your Honor.

THE COURT: Then what was he thrown out for?

MR. CONWAY: Thrown out for failing that test.

THE COURT: Academically?

MR. CONWAY: Yes, your Honor.

THE COURT: Okay.

• • •

[Suppl. Tr., p. 54]

THE COURT: I suggest maybe I haven't made my question clear to you.

MR. CONWAY: I'm sorry.

THE COURT: You're talking to something I didn't have in mind.

I'm suggesting that if there is a rational basis for the faculty making a decision in an individual student's case that this student is not qualified, no matter what it does in regard to all other students, whether it gave a second chance—one instance we know a third chance—that that decision may be made as to an individual student on a case-by-case basis, and not with reference to all of the other actions that they took with regard to all of the other students. That's what I'm focusing on.

If that individual decision is supported rationally, then, do I have the power to go in and say to the faculty, "No, you made the wrong decision in that case because look at all the decisions you made over here?"

Now, the trouble with what you're suggesting or at least the trouble you give me by suggesting it, maybe you can remove my difficulty, is that it seems I have to know every-

thing about all the other cases too before I could decide whether or not they did what they did in the Ewing case, they did what they did in all the other case; isn't that so?

MR. CONWAY: No. Your Honor put in the question, assumption decision is rational. My response——

THE COURT: They had some reason——

MR. CONWAY: Well your Honor, having reason and rational basis, two things as your Honor knows, and——

THE COURT: If there is a reason—let's lay that ghost to rest.

If you're going, if you're going to raise the point what they did was irrational, then I would like to know why, and I will use your own terminology.

You talked about a person being on probation.

MR. CONWAY: Yes, your Honor.

THE COURT: Now, I face that frequently.

MR. CONWAY: Yes, your Honor, I know you do.

THE COURT: We—even though convictions, particularly in the case of youthful offenders are set aside, the fact of the conviction can never be erased even though legally, a youthful person has the conviction expunged, so-to-speak. There is no question but that the fact the youthful offender committed that offense remains.

In this particular case, since you used that analogy, the thought that occurred to me is this: Even though Mr. Ewing made up his deficiencies, the faculty was not irrational in remembering the great difficulty that he had in making them up, was it?

MR. CONWAY: Well it was, I think, unfair not to tell Mr. Ewing it would——

THE COURT: Oh, come on, Mr. Conway. Mr. Ewing knew as much as the faculty did, he knew the difficulty.

MR. CONWAY: We had the removal letter, your Honor——

THE COURT: You mean the faculty goes around the Medical School and say, "Look, everyone's deficiency is removed, keep in mind the fact that you have all the trouble——"

MR. CONWAY: They didn't have to send the letter at all, your Honor, didn't have to tell him the deficiency was removed.

THE COURT: Let's go back to my point.

MR. CONWAY: Your Honor, the point——

THE COURT: Assume—if you don't want to agree with me I can understand that.

MR. CONWAY: Yes, your Honor.

THE COURT: The basis for making a decision in Ewing case, assuming there was some rational basis for the faculty making the individual decision that they did in Mr. Ewing's case to be terminated because he flunked the NBME, cannot that be a decision supported by some rational basis, Standard separate from any other decision that it makes? That's really what I'm getting at.

MR. CONWAY: Your Honor, as you posed it, I'm sure there is an instance where that can happen. I think your Honor, what you have to consider in terms of rational, how they treat everybody.

THE COURT: I'm asking you, can I not disregard what they did for everybody else?

MR. CONWAY: All right.

Your Honor, you can focus on his case. But focusing on his case alone, I don't believe from the facts in this record, it is a rational decision. Mr. Ewing was under—forget—assume for a moment, your Honor, no other student had failed the NBME, assume that for a moment.

THE COURT: All right.

MR. CONWAY: But given the publication, Plaintiff's Exhibit 3, which states their practice, given what all the faculty members said, single rule never come up, but this was the rule that had already been promulgated, that you get a second chance, that it would not be rational not to give him a second chance, and that's leaving aside the other 39, assume they never happened. I don't think it can be rational as to Mr. Ewing not to give him a second chance when that was the forestated policy.

THE COURT: All right.

Let's state that because I think you posed the question better than I did.

If that's a better way, assume the other 39 didn't happen, assume Mr. Ewing is an isolated single case?

MR. CONWAY: Yes, your Honor.

THE COURT: Doesn't *Horowitz* teach that in that area, judges should not intervene——

MR. CONWAY: No——

THE COURT: —for academic reasons faculty decides, "We're not going to give this man another chance to take the test, in our judgment——"

MR. CONWAY: Yes, your Honor——

THE COURT: —then, judges, that something you can't——

MR. CONWAY: I don't believe—on the facts of *Horowitz* when there was no predetermined rule, I agree with you, your Honor. But the fact is——

THE COURT: The contention, there were, and the court said specifically in footnote eight, "These predetermined rules are not going to govern——"

MR. CONWAY: There were no objective standards as there were here.

What we're dealing—not taking Mr. Ewing's essay exam and you reading it and see if you give a different grade than Dr. Reed or Professor LaDu. Those are academic decisions. Academic decisions at the outset to say how many times you get to flunk a course, you're out, got to make it up. Those are academic decisions.

Your Honor, I would not suggest to your Honor—I know your Honor would be loathe to go in and supervise those decisions. The academic decision was made in advance, your Honor, the academic decision you would get two chances, and if he were given the two chances, your Honor, as we say the rule was in advance, then we couldn't ask your Honor, for example, to say give him three chances, give him four chances, give him as many as he needs.

THE COURT: You see, the trouble with that, or the difficulty I have with that, even if I assumed, faced up to that there was such a rule that everybody gets two chances, I have some difficulty whether or not that's the rule.

But even assuming that to be the rule, then what you're saying is there can be no academic decisionmaking in any instance to withhold that from any one student. Everybody gets two chances.

MR. CONWAY: The second test?

THE COURT: Yes.

MR. CONWAY: Yes, your Honor. Academic decision, he had not made up pharmacology——

THE COURT: I suppose anybody comes along—not Mr. Ewing, he's going to live or die by the second test if granted.

Somebody come along and said wanted a third test which was given one student, and therefore now rule at the Medical School there are three times?

MR. CONWAY: Well, your Honor—that—that question has a problem in it because, factually, that is the rule now. But leaving that aside, your Honor, I don't think the testimony would support that. your Honor has to make a factual determination what's the rule, and Dr. Reed testified, two, three for extenuating circumstances and the like.

Your Honor, what we are saying there can be many academic decisions your Honor can't make, whether make them uniform, whether Professor LaDu's right. Here's an objective standard, in advance, promulgated. Mr. Ewing relied on it. And he—it's not being followed, it's not an academic decision, I respectfully suggest.

Kicking Mr. Ewing out because of his attitude, because of his mental state something of the like, the vehicle said that's the honor code.

THE COURT: I understand there is an apple you don't want to bite into. But, there is a decision the faculty has to make, or as to the record presented in this case, I'll have to decide that, that before he can take the NBME a second time, they have to find under all the circumstances, he's qualified to take it and their decision, he's not.

Now, can I intrude into that decision even if I find that the rule is that for all qualified students, they get a second chance?

MR. CONWAY: Well——

THE COURT: Don't you see what I'm driving at?

MR. CONWAY: I do, your Honor. I guess——

THE COURT: How do you answer that?

MR. CONWAY: If your Honor were to find that the rule, in this case, on the evidence, is that the faculty can take everything into account and it was not the fact that Mr. Ewing was dismissed because he failed this exam, but it was for other things, that he didn't make up pharmacology or something of the like, then, then if they had a rational basis for that rule, then your Honor would not set it aside.

But I think, your Honor, the evidence doesn't support that's what it was because Dr. Reed said he was qualified when he took it with and what made him unqualified, he didn't pass the exam.

• • •

[Suppl. Tr., p. 79]

THE COURT: What I'm getting at it—do I understand correctly that the evidence shows, if it shows this, that as to each one of the students who were permitted to take the NBME a second time, that there was, first, a meeting of the Promotion and Review Board whether they applied to a Standard medical student or Inteflex student and a judgment was made to permit that student to continue?

MR. DAVIS: I think that the evidence does show that certainly, that's what happened——

THE COURT: Where, in the evidence, is that shown?

MR. CONWAY: I think Dr. Reed's testimony. If not Dr. Taren, I think it was Dr. Reed.

THE COURT: If I go back and look at Dr. Reed's testimony, do you agree with that Mr. Conway, that such judgments were made——

MR. CONWAY: Well, your Honor, I agree that the Promotion Board had it on their agenda. I disagree judgment was made because Dr. Reed testified it was routine procedure.

THE COURT: Well, whether or not the judgment was routine or not——

MR. CONWAY: He didn't use the word judgment, came before the Board——

THE COURT: Let's use some other word.

MR. CONWAY: All right.

THE COURT: What do you want to use, decision?

MR. CONWAY: Your Honor, I don't—all I can—words that he used——

THE COURT: Without——

MR. CONWAY: Yes——

THE COURT: —without clothing with dignity and judgment, I don't mean to put emphasis on that, was there an event that occurred prior to the time the student took the NBME the second time, and was that even some kind of a deicsion by the Promotion and Review Board that the student could continue?

MR. CONWAY: The student was permitted to continue by the Promotion and Review Board, and continued—I don't know—we don't have evidence what kind of decision-making process it was.

It's true it came before the Promotion and Review Board and before the time the student could retake the exam. But, I don't think there is any evidence in terms what the Promotion and Review Board did when that student's name came up, that there was any consideration, the student was evaluated or the like.

THE COURT: One way or other?

MR. CONWAY: I don't think there's any evidence on that at all. It is a fact, by the testimony, that it did come up in the Promotion and Review Board.

THE COURT: In this instance, in order to grant the relief you seek, I would have to make a decision first in that area, would I not?

MR. CONWAY: I think the decision is it was routinely done.

THE COURT: No——

MR. CONWAY: Routinely done——

THE COURT: No, no, no——

MR. CONWAY: I think it was a record keeping process.

• • •

[Suppl. Tr., p. 82]

[THE COURT] • • • In order for Mr. Ewing to take this examination the second time, something has to happen; he has to be a student good standing——

MR. CONWAY: He has to be—I think the term is an enrolled student.

THE COURT: That requires a decision on my part?

MR. CONWAY: Whether he should be an enrolled student, your Honor, yes, your Honor.

THE COURT: So that the relief you seek, injunctive order seeks two parts: First, that he be placed back in the Medical School as an enrolled student, right, and secondly, that he be permitted to take the examination?

MR. CONWAY: For purposes of taking the exam, yes, your Honor.

• • •

EXHIBITS INTRODUCED INTO EVIDENCE AT TRIAL

JOINT EXHIBIT 1

STIPULATION

Plaintiff, SCOTT E. EWING, and defendant, BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, by their attorneys, stipulate to the accuracy only of the following facts:

1. The answers to interrogatories given by defendant (marked as Plaintiff's Exhibit 1) identify all students enrolled in the University of Michigan standard curriculum and all students enrolled in the Inteflex Program who failed the NBME Part I since 1975 and were granted permission to retake the NBME Part I. These answers also reflect other academic information about each such student.

2. Other than Scott E. Ewing, none of the Inteflex students listed in Plaintiff's Exhibit 1 received an honors grade in any medical school course. Two of the 32 standard curriculum students listed on Plaintiff's Exhibit 1 have received an honors grade.

3. Other than Scott E. Ewing, none of the Inteflex students listed in Plaintiff's Exhibit 1 published any medical research prior to taking the NBME Part I examination. Three of the 32 standard curriculum stndents have engaged in medical research prior to taking the NBME Part I.

4. With respect to Column 4 of Plaintiff's Exhibit 1 (pages 1-6) relating to standard curriculum students, the number indicates the number of academic courses taken by each standard medical student in which the student either failed the course or had to repeat the final examination for academic reasons. The total number of courses taken by such students prior to sitting for the NBME Part I ranged

from 10 to 13 courses. The total number of courses taken by Inteflex students prior to sitting for the NBME Part I was either 22 or 23 courses.

/s/ PETER A. DAVIS
January 10, 1983

/s/ MICHAEL M. CONWAY
January 10, 1983

PLAINTIFF'S EXHIBIT NO. 1
(Chart Derived from Defendant's Answers to Interrogatories)

STANDARD STUDENTS

Identifying Symbol or Description of Each Student	Number of Times Each Student Was Permitted to Take the NBME Part I	Dates on Which NBME Part I Was Taken	Number of Academic* Courses In Which Each Student Had Received Final Grade of "D" or "E"
A1	3	6/76 9/76 9/77	5
B1	2	6/75 9/75	1
B2	2	6/76 9/76	3
C1	2	6/75	4
C2	2	6/75 9/75	2
D1	4	6/75 9/75 6/76 9/76	3
D2	2	6/76 9/76	0
D3	2	6/76 9/76	2
D4	2	6/76 6/79	4

*D or E grades are not used for standard students in the curriculum. The numbers in this column represent courses in which the student was required, for academic reasons, to take a make-up examination or repeat the course

STANDARD STUDENTS

Identifying Symbol or Description of Each Student	Number of Times Each Student Was Permitted to Take the NBME Part I	Dates on Which NBME Part I Was Taken	Number of Academic* Courses In Which Each Student Had Received Final Grade of "D" or "E"
D5	2	6/76 9/76	4
D6	2	6/76 9/76	4
E1	2	6/76 9/76	3
E2	2	6/76 9/76	7
E3	2	6/76 9/76	1
E4	2	6/76 9/76	1
E5	2	6/76 9/76	0
E6	2	9/80 5/81	5
F1	3	6/77 9/77 6/78	0

*D or E grades are not used for standard students in the curriculum. The numbers in this column represent courses in which the student was required, for academic reasons, to take a make-up examination or repeat the course

STANDARD STUDENTS

Identifying Symbol or Description of Each Student	Number of Times Each Student Was Permitted to Take the NBME Part I	Dates on Which NBME Part I Was Taken	Number of Academic* Courses In Which Each Student Had Received Final Grade of "D" or "E"
F2	2	6/77 9/77	3
G1	3	6/79 9/80 2/81	4
G2	3	6/79 9/79 6/80	3
G3	3	6/79 9/79 6/80	5
H1	2	6/79 9/79	0
H2	3	6/79 9/79 6/80	0
H3	2	6/80 9/80	1
H4	3	6/79 9/79 6/80	3
H5	2	6/79 9/79	0

*D or E grades are not used for standard students in the curriculum. The numbers in this column represent courses in which the student was required, for academic reasons, to take a make-up examination or repeat the course

STANDARD STUDENTS

Identifying Symbol or Description of Each Student	Number of Times Each Student Was Permitted to Take the NBME Part I	Dates on Which NBME Part I Was Taken	Number of Academic* Courses In Which Each Student Had Received Final Grade of "D" or "E"
I1	2	6/82 9/82	3
I2	3	6/81 9/81 6/82	0
I3	3	6/81 9/81 4/82	0
J1	2	6/82 9/82	3
J2	2	6/82 9/82	0

*D or E grades are not used for standard students in the curriculum. The numbers in this column represent courses in which the student was required, for academic reasons, to take a make-up examination or repeat the course

INTEFLEX STUDENTS
(includes only Program courses)

Identifying Symbol or Description of Each Student	Number of Times Each Student Was Permitted to Take the NBME Part I	Dates on Which NBME Part I Was Taken	Number of Academic Courses In Which Each Student Had Received Final Grade of "D" or "E"*	Existence of Other Academic Deficiencies (including Incompletes Grades and Retests of Final Examinations **	Total Number of Courses With Academic Problems ***
A1	2	6/77 9/77	1	no	1
A2	2	6/77 9/77	2	no	2
A3	2	6/77 6/78	5	yes	9
A4	2	6/77 9/77	2	no	2
B1	2	6/77 9/77	0	yes	1
C1	1	6/81	1	yes	3
D1	2	6/82 9/82	3	yes	4
D2	3	6/81 9/81 6/82	2	no	2

* D or E grades are only used for courses credited by LSA toward the Bachelor's Degree

** I (incomplete) grades have been used for both academic and non-academic reasons

*** refers to courses in which student was required to make-up examination or repeat a course for academic reasons

PLAINTIFF'S EXHIBIT No. 1—continued

MICROANATOMY AND GENERAL PATHOLOGY 506

Winter 1979: Three students received an E and all were required to repeat the course. The raw scores for these three students were:

Student A: 63.2%
Student B: 62.3%
Student C: 61.7%

Winter 1980: Four students received a D grade and were given make-up examinations. No students received an E grade. The raw scores for these four were:

Student A: 68.4%
Student B: 66.4%
Student C: 65.9%
Student D: 64.6%

PLAINTIFF'S EXHIBIT NO. 3

("On Becoming A Doctor"—Publication)

Excerpt

• • •

[p. 30]

IS THERE A DOCTOR IN THE HOUSE?

• • •

According to Dr. Gibson, the support services offered fall into four areas: (1) help in the development of appropriate and effective study skills, (2) tutorial assistance, (3) counseling, and (4) mental health guidance. So highly regarded are these services that at least half of the medical students make use of one or more of them during their years in the Medical School.

Dr. Gibson also points out that, in addition to problems arising from the stress of high-level competition, there is a tendency on the part of some medical students never to show weakness. They tend not to communicate their fears or failures either to their peers or to their family. Instead, they suffer in silence, which can create debilitating depression.

According to Dr. Gibson, everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board exams. Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam.

Very little is left to chance, says Dr. Gibson, and the conscientious, qualified student need never feel "lost," given the support services that are available. Through the study skills and tutorial offices, a student experiencing difficulty can be instructed in such essential matters as effective note taking and proper study habits. Copies of old exams

are readily available to all students, and they are encouraged to study them carefully to gain a clear understanding of the nature of medical school exams and the criteria used for grading and evaluation.

• • •

MEDICAL CENTER REPORT

The *Medical Center Report* is published by The University of Michigan Medical School and the Office of Health Sciences Relations. Copies are available without charge to Medical Center alumni, faculty, students, staff and friends.

• • •

Published 1981.

PLAINTIFF'S EXHIBIT NO. 9

January 26, 1981

Mr. Scott Ewing
1010 Catherine, #203
Ann Arbor, MI 48104

Dear Mr. Ewing:

The Inteflex Phase II Promotion and Review Board at its January 12, 1981 meeting was pleased to learn of the removal of your Neuroscience 509 deficiency.

The Board joins me in expressing best wishes for continued success in the program.

Sincerely yours,

/s/ Robert E. Reed, M.D.
Associate Dean
Director, Integrated
Premedical-Medical Program

PLAINTIFF'S EXHIBIT NO. 14
Excerpt

November 25, 1981

Dr. W. Lindsay Ogilvy
Dean of Admissions
Faculty of Medicine, McGill University
McIntyre Medical Sciences Building
3655 Drummond Street
Montreal, Quebec, Canada H3G 1Y6

Dear Dean Ogilvy:

Mr. Scott Ewing has asked that I write a letter regarding his application for transfer to your school. In the Fall of 1975, Scott entered The University of Michigan in the Integrated Premedical–Medical Program (Inteflex). This Program is a joint offering of the College of Literature, Science and the Arts and the Medical School. Each year, 50 outstanding high school seniors are admitted to the curriculum which leads, in six years, to the receipt of both the Bachelor's of Science and the M.D. degree. Scott entered with an outstanding high school record as one of ten out-of-state students selected that year—out-of-state students need to be highly competitive in order to obtain one of the limited positions available. Scott completed the first two years in three calendar years, being on leave for one year. After returning from leave, Scott performed in an excellent fashion and was awarded class honors for scholastic achievement in the 1979-80 year by the College of Literature, Science and the Arts.

• • •

It should be noted that Scott's academic record in the four-year preclinical portion of the Program was compiled in the Inteflex curriculum, a major portion of which was in Medical School courses in the basic medical sciences. These courses are graded by the Medical School Honor/Pass/Fail

system but because they are credit in the College of Literature, Science and the Arts towards the bachelor's degree, letter grades are also assigned. These grades were therefore achieved in competition with the small, highly-select Inteflex group in classes taught and graded at the Medical School or graduate level. Students are considered in good standing if a 2.0 grade point (C) average is maintained. His record, therefore, should not be compared with a standard undergraduate pre-medical transcript.

At the end of the fourth year, students in the Inteflex Program take a three-week Introductory Clerkship course in which the clinical skills of history taking and physical diagnosis are integrated as students do complete histories and physicals and discuss them with a special faculty. Scott was awarded Honors for this course, which was completed prior to the Promotion Board meeting, with highly complimentary comments from the faculty regarding his performance there.

During his time in the Program, Scott has been quite active in extra-curricular activities and research. He received a medical student research fellowship in the Summer of 1978, working with Dr. Golder Wilson of our Pediatrics department on Restriction Endonuclease *Eco* RI. Scott's work was selected for presentation at the Tenth Annual Midwest Student Research Forum and an abstract of his work has been published in *Clinical Research*. Scott is an accomplished writer and has won two Hopwood awards in The University of Michigan creative writing contests. In 1979 he won an underclass award and during this past year won a major award for the first half of a book. The judges for this work described it as "so impressive both in scope and self-insight that it is clearly the winner—the final section is eloquent and moving".

• • •

• • • I should stress that the Board's action was not taken because of unethical or dishonest behavior nor were his intellectual capabilities in question. In his interactions with me, Scott has always been sincere, appropriately concerned with his standing in the Program and behaved in a manner befitting a medical student and future physician.

Sincerely,

/s/ Robert E. Reed, M.D.
Associate Dean
Director, Integrated
Premedical–Medical Program

PLAINTIFF'S EXHIBIT NO. 18

(Chart Derived from Defendant's Supplemental Answers to Interrogatories)

STANDARD PROGRAM STUDENTS Page 1 of 2

IDENTIFYING CODE	DID STUDENT PASS NBME PT. I EXAM	# BASIC SCIENCE COURSES SUCCESSFULLY PASSED	# BASIC SCIENCE HONOR GRADES	SPECIAL AWARDS–HONORS RESEARCH ACTIVITY	WAS STUDENT PERMITTED TO BEGIN CLINICAL PHASE
A1	No	10	0	No	No—Terminated
B1	Yes	11	0	No	Yes
B2	No	10	0	No	No—Terminated
C1	No	10	0	No	No—Withdrew
C2	Yes	10	0	No	Yes
D1	Yes	10	0	No	Yes
D2	Yes	10	0	No	Yes
D3	Yes	10	0	No	Yes
D4	Yes	10	0	No	Yes
D5	Yes	10	0	No	Yes—Withdrew to Transfer
D6	Yes	10	0	No	Yes
E1	Yes	10	0	Yes—Summer Research	Yes
E2	Yes	10	0	No	Yes
E3	Yes	10	0	No	Yes
E4	Yes	10	0	No	Yes
E5	Yes	10	0	No	Yes

IDENTIFYING CODE	DID STUDENT PASS NBME PT. I EXAM	# BASIC SCIENCE COURSES SUCCESSFULLY PASSED	# BASIC SCIENCE HONOR GRADES	SPECIAL AWARDS–HONORS RESEARCH ACTIVITY	WAS STUDENT PERMITTED TO BEGIN CLINICAL PHASE
E6	Yes	10	0	No	Yes
F1	Yes	11	0	No	Yes
F2	Yes	11	0	No	Yes
G1	Yes	10	0	No	Yes
G2	No	11	0	No	No—Terminated
G3	Yes	11	0	No	Yes
H1	Yes	10	0	No	Yes
H2	No	10	1	No	No—Terminated
H3	Yes	12	0	No	Yes
H4	No	10	0	No	No—Terminated
H5	Yes	10	0	No	Yes
I1	No	14	0	No	No—Leave of Absence
I2	Yes	12	0	Yes—Research Forum	Yes
I3	Yes	12	0	No	Yes
J1	Yes	13(+1/AP)	0	Yes—Summer Research	Yes
J2	Yes	13(+1/pending)	2	No	Yes

DEFENDANT'S EXHIBIT NO. 9

(Inteflex Promotion and Review Board Minutes—July 24, 1981)

(Excerpt)

INTEGRATED PREMEDICAL—MEDICAL PROGRAM
PHASE II PROMOTION AND REVIEW BOARD

July 24, 1981 1:00

Dean's Conference Room

AGENDA

• • •

CONFIDENTIAL

• • •

Please bring agenda to the meeting

INTEGRATED PREMEDICAL—MEDICAL PROGRAM
PHASE II PROMOTION AND REVIEW BOARD

Make-up of the Board

Robert E. Reed, M.D., Director—Presiding

A. Voting Members
- Ken Casey, M.D., Neuroscience II
- William Burkel, M.D., Anatomy
- Bruce Carlson, M.D., Dev. Anatomy
- Roy Glover, Ph.D., Neuroscience I
- William Murphy, M.D., Microbiology
- Arthur French, M.D., Human Illness
- Raymond Kahn, M.D., Microanatomy & Gen. Path.
- Henry Gershowitz, M.D., Genetics
- David Youel, M.D., Clin. Studies 400
- Bertram Schnitzer, M.D., Pathology–Human Illness
- Gail Barton, M.D., Clin. Studies 420
- William Pratt, M.D., Pharmacology
- Andrew Zweifler, M.D., Intro. Clerkship
- Carol Kaufman, M.D., Clin. Studies 410
- Sandra Cole, Clin. Studies 510

B. Guests and Others
- Sheryl J. Gierok, Inteflex, Admin. Asst.
- William Howatt, M.D., Inteflex Admissions
- Alan Smokler, M.D., Student Health Service
- Donald Brown, Ph.D., College of LS&A
- Alice Cohen, Inteflex Staff
- Helen Ferran, Inteflex Staff
- Jane Schultz, Ph.D., Curriculum Asst. Dean
- William Breckwoldt, Student
- Natalie Nazark, Student

INTEGRATED PREMEDICAL—MEDICAL PROGRAM
PHASE II PROMOTION AND REVIEW BOARD
July 24, 1981 1:00
Dean's Conference Room

Robert E. Reed, M.D., Director, Presiding

I. Promotion Board Proceedings

II. Approval of minutes of last meeting

III. Students eligible for promotion to the Clinical Phase (Phase III):

IV. Provisional Promotion to Phase III:

Ewing, Scott (pending successful completion of National Board (Part I)—Drop. from Reg.
• • • (pending successful completion of National Board, Part I) Retake Bds. Sept.

V. Students with deficiencies in one or more required courses:

Name	*Course*	*Deficiency*	*Action*
• • •	Neuroscience	E	Leave of absence 9/81; retake
• • •	Neuroscience	E	Irreg. Prog. 9/81; retake Sp 82
• • •	Neuroscience	D	Make up exam Sept. 81
• • •	Neuroscience	D	Make up exam Sept. 81
• • •	Neuroscience	D+	Make up exam 8/7/81
• • •	Phil. 344 (Ethics)	I	Will turn in paper
• • •			
• • •	Dev. Anat. 508	D	Make up exam 7/20/81—Pass

VI. Students requesting leave of absence:

• • • Granted commencing 9/81
• • • " • • • ended up applying for Irreg. Progm.—granted comm. 9/81
• • • "
• • • "
• • • "
• • • "

JA-124

VII. Students who successfully removed deficiencies:

Name	*Course*	*Completed*
• • •	Clin Studies 400	P
• • •	Clin Studies 400	P
Scott Ewing	Pharm. 627	P
• • •	Gross Anatomy 507	P

VIII. Enrollment Status (*pre*-Board status):

Class of 1983			*Class of 1984*		
Original Class		50	Original Class		50
Dropped/Resigned	—3		Dropped/Resigned	—2	
Leave of Absence	—3		Leave of Absence	—4	
Irregular Program	—9		Irregular Program	—7	
Regular Progress		35	Regular Progress		37
Addition to class	+13		Addition to Class	+13	
TOTAL		48	TOTAL		50

JA-125

PHASE II PROMOTION AND REVIEW BOARD

July 24, 1981 1:00

DEAN'S CONFERENCE ROOM

Robert E. Reed, M.D., Director, presiding.

Members present: Drs. French, Friedman, Gershowitz, Glover, Jones, Schnitzer, Youel and Zweifler.

Special Guests and Others: Mrs. Cohen, Dr. Brown, Mrs. Ferran, Ms. Gierok.

The Promotion Board convened at 1:15 p.m.

Dr. Reed reminded those in attendance of the confidentiality of the proceedings and the necessity of referring all questions directly to him or the administrative staff. The minutes of the May 8, 1981 meeting were approved as circulated.

Dr. Reed noted the students who are eligible for promotion to the clinical phase (Phase III) of the Program. He also reported that two students, Scott Ewing and • • •, were listed on the provisional promotion list because they did not obtain a qualifying score of 345 on the National Board Part I examination.

Dr. Reed commented that • • • performance in Human Illness was borderline during the first part of the year, but improved during the second half of the course. • • • passed Pharmacology but seems to have had somewhat of a crisis of confidence. The Board felt that with adequate preparation • • • would successfully pass the retake of National Boards Part I in September, and approved that course of action.

Dr. Friedman stated his concerns regarding the poor performance of Scott Ewing on the Boards and his repeated past borderline performance and deficiencies. Dr.

Reed reported that Mr. Ewing entered the Program in the Fall of 1975 during which he received a C in Chemistry, a C in Biology, a Pass in Freshman Seminar, and a C in a writing course. In the Winter term of 1976, he received a C in Chemistry 220, a B in Freshman Seminar, and withdrew from the Psychology 504 course. At that point he had not completed the work of the first year and was placed on a leave of absence. He took physics 125 and 126 in the Summer and Fall of 1976 at Point Loma College in California.

Mr. Ewing returned to the Program in the Winter of 1977 and received an A– in Chemistry 220 and an A in three other LS&A courses. In the Spring of 1977 he passed Introduction to Patient Care and during the 1977-78 year he passed all his courses and was promoted to Phase II.

In the Fall of 1978 he received an Incomplete which was converted to a Pass in Clinical Studies 400, a B in Microbiology 420 and an Incomplete in Gross Anatomy 507. The Gross Anatomy incomplete was converted to a C– by the make-up exam. During the Winter of 1979 he received C– in Genetics 505, a C in Microbiology 520, an E in Microanatomy and General Pathology 506, a B in Creative Writing and a Pass in Clinical Studies 410. Dr. Reed also noted that the Grade Appeal Committee met on May 22, 1979 to consider an appeal from Mr. Ewing that the Microscopic Anatomy and General Pathology be changed to a D. Mr. Ewing's appeal was denied. He removed his Microanatomy and General Pathology 506 deficiency by repeating the course during the Winter term of 1980 and receiving a C+. In the Spring term of 1980, he took Developmental Anatomy with a B– and received a C grade in Neuroscience I 509 after a re-examination to remove a deficiency. The Board in their July 30, 1980 letter noted concern and reminded him that any further deficiencies in the Program would be grounds for dismissal from registration. In the Fall of 1980, Mr. Ewing received a passing grade in Neuro-

science 609 and Pharmacology 626. In the Winter term of 1981 he received a passing grade for Clinical Studies 510 and a deficiency in Pharmacology 627. Dr. LaDu's comments noted that Mr. Ewing had a 65.7 average going into the final and received a 63.8 on the comprehensive final examination. He was given a make-up examination on May 27, 1981 on which he received a 67.7 score. This raised his overall average above 70% for the second semester if the second concurrent grade of 40% were not included. The Pharmacology Department expressed concern that he had several disappointing, spotty deficiencies in cardiovascular, autonomic, antibotic and endrocrine pharmacology that needed to be corrected if he were to pass the National Boards. Dr. Reed commented that his scores on the examinations in Human Illness fluctuated a great deal throughout the year with a borderline passing score on both the clinical and pathology portions. Overall he received the lowest score in the class. In June of 1981, Mr. Ewing took Part I of the National Board examination and received the lowest score in his class. His 235 score did not qualify him to continue on with the clinical phase of the Program for which a score of 345 is required.

Dr. Reed summarized that Mr. Ewing has now been in the Program for six years and taken three years to complete both Phases. The Board noted that Mr. Ewing had been warned that any further deficiencies would lead to his dismissal from the Program and it was agreed that failure in Part I of the National Board examination constitutes a deficiency. After further discussion, it was moved and seconded that Mr. Ewing be dropped from registration because of the absence of extenuating circumstances that would warrant reversing the previous statements that further deficiencies would lead to dismissal from the Program. The Board unanimously voted to drop Mr. Ewing from registration in the Program.

The Board then turned to students with deficiencies in one or more required courses. Dr. Reed reported that • • • received E in Neuroscience I 509. • • • is requesting a leave of absence from the Program for the Fall term 1981 and Winter term 1982 and plans to return in the Spring of 1982 to retake the Neuroscience course to remove this deficiency. • • • explained in • • • letter that a lack of time was instrumental in his poor performance during the Spring term of 1981. • • • is requesting a leave of absence to allow • • • time to concentrate on interests in other areas and also to regain • • • self-motivation in the sciences. Dr. Glover's comments indicated that • • • never really applied himself the way in which • • • was capable of doing. Personal commitments at the beginning of the term interfered with his academic work which resulted in poor performance throughout the course. Dr. Glover recommended that • • • not take a make-up examination, but repeat the course. The Board approved this plan of action and further approved • • • request for a leave of absence from the Program until the Spring of 1982.

The Board then turned its attention to the deficiency of • • • who received an E in Neuroscience I 509. • • • is requesting an irregular program at this time. He would like to take Pharmacology during the Fall term of 1981 plus LS&A courses; take the remainder of the Pharmacology sequence in the Winter term of 1982, as well as LS&A courses; and, then make up this Neuroscience deficiency by either taking the M-1 NBS course to satisfy the deficiency or retaking Neuroscience I 509 during the Spring term of 1982. Dr. Glover indicated that the material in Neuroscience I is taught in NBS 500 during the Winter term and in NBS 600 during the following Fall term. Therefore, • • • would have to retake Neuroscience I 509 in the Spring term of 1982 or obtain permission from the NBS Department and Neuroscience Department to do otherwise. During the coming year, • • • also plans on

taking language courses which would satisfy his LS&A requirement. The Board then approved • • • request for an irregular program commencing with the Fall term of 1981 and to retake Neuroscience I 509 in the Spring term of 1982.

The next deficiency discussed was that of • • • who received a D in Neuroscience I 509. Dr. Reed reported that • • • went through the Program her first year with no deficiencies and then in the Fall of 1978 received a D in Physics 240. She then went on a leave of absence during the Fall of 1979 and removed her Physics 240 deficiency in the Winter of 1980. During the Winter term of 1981 she received 2 C's and now in the Spring of 1981 she has a D in Neuroscience I 509. Dr. Glover stated that he was surprised she did so poorly on the final exam. He felt that her performance was weakened by taking the examination early. She was always in class and seemed to be up on the material. It was Dr. Glover's recommendation that • • • be given a make-up examination at the end of the summer. The Board approved this course of action.

• • • was then discussed for receiving a D in Neuroscience I 509. Dr. Reed reported that • • • went through the Program with no problems until the Winter of 1981 when he received an E in Philosophy 202. Mrs. Ferran commented that this is a course he discovered he did not enjoy until he was halfway into the term, but failed to drop the course in time to prevent an E grade. Then during the Spring of 1981 he received a D in Neuroscience I 509. Dr. Glover then indicated that • • • elected not to take the mid-term examination in this course, and therefore his entire grade was dependent upon his performance on the final examination on which he received a D grade. Dr. Glover noted that he was in and out of class sporadically and very quiet. It was Dr. Glover's recommendation that • • • be given a make-up examination when he returned from Europe at the end of the summer. The Board approved this recommendation and suggested the counselors talk to him to see if there are any possible motivational problems contributing to his poor performance.

• • • received a D+ in Neuroscience I 509. Dr. Reed reported that he came into the Program with SAT scores of 1220 which is considerably lower than other students in the class. During his first term in the Program he received a D in Chemistry 120. He withdrew from a language course but he was able to stay with his class by taking a summer course, Chemistry 225, in 1979. He had a satisfactory performance during his second year in the Program and then in the third year he received a D in Gross Anatomy 507 during the Winter term which he will remove by taking a make-up examination in the Summer of 1981. He then received a D+ in Neuroscience I 509 in the Spring of 1981. Dr. Glover stated that he got a 75% on the mid-term, but only 60% on the final which is too low to allow him to pass. He felt that he needs to demonstrate that he knows the material and studying again will help him. It was therefore Dr. Glover's recommendation that • • • be given a make-up examination and the Board approved this request. A date for this re-examination has been set for August 7, 1981.

Dr. Reed then noted that • • • had an incomplete in Philosophy 344 (Ethics), which was just a matter of turning in a paper. The Board voted and approved this plan of action.

The last deficiency discussed was that of • • • for receiving a D in Developmental Anatomy 508. Dr. Reed noted that • • • has had an up and down and borderline performance in the Program. He received a D in Microanatomy and General Pathology 506 and a D in Gross Anatomy 507 during the Winter term of 1981. He will be given a make-up examination to remove these deficiencies. He then received a D in Developmental Anatomy 508. It

was the recommendation of the instructor of the Developmental Anatomy course that he be given a make-up examination, which • • • took this week and received a score of 76% to give him an average of 72% for the course. The Board agreed with his plan of action, and expressed concern over his declining performance these past two terms.

The Board then turned its attention to students who are requesting a leave of absence. • • • is requesting a leave of absence during the 1981-82 academic year and planning on returning to the Program in the 1982-83 academic year. He plans to take an elective in the Internal Medicine Department of a hospital in Jerusalem and travel in Europe. Dr. Reed stated that • • • had successfully completed the first three years of the Program with no deficiencies. The Board approved • • • request for a leave of absence commencing with the 1981-82 academic year.

• • • would like to request a leave of absence for the 1981-82 academic year because he plans to travel, work part-time and possibly take an externship experience. Mrs. Cohen indicated that he needs the time off to do other things. The Board agreed with his request to take a leave of absence commencing with the Fall of 1981.

• • • is requesting a leave of absence for the 1981-82 academic year and plans to study in Israel or a university in the Western United States. Dr. Reed noted that • • • has a good record in the Program. The Board approved her request for a leave of absence for the 1981-82 academic year.

The last request for a leave of absence was that of • • • who would like to pursue studies in the Division of Biological Sciences here at The University of Michigan. The Board noted she has a good record so far in the Program and approved her request for a leave of absence for the 1981-82 academic year.

There being no further business, the meeting was adjourned at 2:45 p.m.

Respectfully submitted,

/s/ Sheryl J. Gierok
Sheryl J. Gierok
Administrative Assistant
Inteflex

SJG:cw

DEFENDANT'S EXHIBIT NO. 10

(Inteflex Promotion and Review Board Minutes—July 31, 1981)

(Excerpt)

INTEGRATED PREMEDICAL—MEDICAL PROGRAM
PHASE II PROMOTION AND REVIEW BOARD

July 31, 1981 1:00

ADMISSIONS CONFERENCE ROOM

AGENDA

• • •

CONFIDENTIAL

• • •

Please bring agenda to the meeting

INTEGRATED PREMEDICAL—MEDICAL PROGRAM
PHASE II PROMOTION AND REVIEW BOARD

Make-up of the Board

Robert E. Reed, M.D., Director—Presiding

A. Voting Members
Ken Casey, M.D., Neuroscience II
William Burkel, M.D., Anatomy
Bruce Carlson, M.D., Dev. Anatomy
Roy Glover, Ph.D., Neuroscience I
William Murphy, M.D., Microbiology
Arthur French, M.D., Human Illness
Raymond Kahn, M.D., Microanatomy & Gen. Path.
Henry Gershowitz, M.D., Genetics
David Youel, M.D., Clin. Studies 400
Bertram Schnitzer, M.D., Pathology-Human Illness
Gail Barton, M.D., Clin. Studies 420
William Pratt, M.D., Pharmacology
Andrew Zweifler, M.D., Intro. Clerkship
Carol Kaufman, M.D., Clin. Studies 410
Sandra Cole, Clin. Studies 510

B. Guests and Others
Sheryl J. Gierok, Inteflex, Admin. Asst.
William Howatt, M.D., Inteflex Admissions
Alan Smokler, M.D., Student Health Service
Donald Brown, Ph.D., College of LS&A
Alice Cohen, Inteflex Staff
Helen Ferran, Inteflex Staff
Jane Schultz, Ph.D., Curriculum Asst. Dean
William Breckwoldt, Student
Natalie Nazark, Student

INTEGRATED PREMEDICAL—MEDICAL PROGRAM
PHASE II PROMOTION AND REVIEW BOARD

July 31, 1981 1:00
ADMISSIONS CONFERENCE ROOM

AGENDA

Robert E. Reed, M.D., Director, Presiding

I. Promotion Board Procedures

II. Approval of minutes of last meeting

III. Student requesting a leave of absence
• • • s/ granted eff. Fall '81 /s

IV. Student appeal
Scott Ewing

PHASE II PROMOTION BOARD

1:00 p.m. July 31, 1981

ADMISSIONS CONFERENCE ROOM

Robert E. Reed, M.D., Director, presiding.

Members present: Drs. Burkel, Friedman, French, Gershowitz, Glover, Murphy, Pratt, Schnitzer.

Special Guests and Others: Dr. Smokler, Mrs. Cohen, Mrs. Ferran, Ms. Gierok.

A special meeting of the Inteflex Phase II Promotion and Review Board was called to order at 1:00 on July 31, 1981 by Robert E. Reed, M.D., Program Director and Chairman of the Committee. Dr. Glover noted that the reference to the standard NBS course extending into the Winter term should be corrected to state that the material covered in the Neuroscience I course is covered in NBS 500 in the Winter Term plus NBS 600 the following Fall Term. Therefore, tak`ng that course as a replacement for the Neuroscience I course would require attendance over two academic years. With this correction, the minutes were approved as circulated.

The Board then turned to the request of • • • for a leave of absence. Dr. Reed noted that • • • had overlooked the fact that she should apply to the July meeting of the Board and asked that her request be considered after that deadline. She plans to use the leave to pursue studies in interior design at Eastern Michigan University. After discussing the potential risk of having a difficult to manage bulge of enrollments in the I-3 class during the 1982-83 year, the Board approved her request for a leave of absence.

The Board then turned to the appeal of Scott Ewing. Dr. Reed noted that the Board at its previous meeting had

voted to drop Mr. Ewing from registration in the Program. Inteflex procedures state that students in this situation have the right to appear before the Board to present evidence of which the Board may not have been aware and to make their case personally. Dr. Reed noted that subsequent appeals must go to the Executive Committee of the Medical School as the Promotion and Review Boards are Medical School committees. Dr. Reed then reviewed Scott's record again for the Board. He noted that Scott entered the Program in the Fall of 1975 and that at the end of his second year in the Program, because of withdrawals and incompletes, he had been placed administratively on an irregular program and was not allowed to go on into the Introduction to Patient Care course. The May 1976 Board confirmed that irregular program but stated that they wished to review his case in July to determine what progress had been made on removing the incompletes. By the July meeting, Mr. Ewing had completed the incomplete work and was then placed on a leave of absence. During the summer and fall of 1976 he took two physics courses in California, receiving A's.

He was readmitted to the Program in the Winter of 1977, passed the Introduction to Patient Care course in the Spring of 1977 and during the 1977-78 school year completed the remainder of his Phase I coursework without difficulty. In July of 1978 he was promoted to Phase II of the Program. At the end of the Fall term in 1978, illness prevented him from completing the Gross Anatomy and Clinical Studies coursework. He made up those incompletes during the Winter term of 1979 but during that term received an E grade in Microscopic Anatomy and General Pathology. After an unsuccessful appeal of that grade, Mr. Ewing, on July 25, 1979, was placed on an irregular program and was warned that "... any further deficiencies will lead to your being dropped from registration in the Inteflex Program ..." He was not enrolled at The University of Michigan during the Fall term of 1979.

The Winter term of 1980 he repeated the Microscopic Anatomy and General Pathology course with a C+ grade and passed his courses in the Spring term of 1980 although a make-up examination was required in the Neuroscience I 509 course. The July 25, 1980 Phase II Promotion and Review Board sent him a letter noting his Neuroscience deficiency and stating "... that any further deficiencies in the Program would be grounds for your dismissal from registration ..." This past year he successfully completed the work of the Fall term but had several poor scores on examinations during the Winter term in Pharmacology and in the Human Illness course. At the end of the Winter term he passed the Human Illness course but with the lowest overall score in the class. He had received a 67% score on the Pharmacology final and received a passing grade because the Department agreed to not count the second concurrent examination in the Winter term on which he received a 40% grade. Dropping this test raised his overall grade to above 70%. Scott then received a 235 score on Part I of the National Board, scoring below 300 on all subsets on the examination except for Pathology where he received a 400 and Behavorial Sciences where he received a 420.

At the last Promotion Board meeting, the Board unanimously voted to drop him from registration from the Program on the grounds that he had received a deficiency in the National Board examination after having been warned on two occasions that the further deficiencies would be grounds for dismissing him from the Program. Since that meeting, Scott has completed the Introductory Clerkship at the Chelsea Family Practice Clinic, receiving an honors grade and the instructor's comments were noted by the Board. The Board then reviewed the letter from Mr. Ewing stating the background for his appeal.

Mr. Ewing then joined the meeting and reviewed with the Board the events of the previous year. He noted that

his mother's heart attack in the Spring of 1980 had been a disrupting influence during the summer and early fall but that in spite of that he had performed satisfactorily throughout the Fall term in what he described as the most difficult term in the curriculum. However, early in the Winter term a 5½ year close relationship with his girl friend ended. Scott described this as having a greater negative effect on him then it should have primarily due to the length and closeness of the relationship and the fact that he had changed classes twice and therefore did not have the close relationship with classmates that other Inteflex students had who stayed with their classes.

He also noted that he had spent a great deal of time preparing a paper for the Hopwood Essay contest. He circulated this 100-page paper among the Board members for review. Mr. Ewing stated that in retrospect he should not have devoted this much time to his writing but that he felt a commitment to his instructor who had encouraged his work. Scott said that the work on the paper and his personal crisis had caused him to get behind in his work in Human Illness and Pharmacology and that he was only beginning to recover by the end of the year. He cited his passing scores on the last examinations in Human Illness and Pharmacology as evidence that his performance was improving. He stated that the requirement for a make-up examination in Pharmacology was a great shock to him and that he was under a great deal of pressure because of the previous Board stipulations regarding further deficiencies. After successfully completing the Pharmacology make-up examination he only had ten days to prepare for the Boards. His background, the fact that he was further away from the basic medical science courses than other Inteflex students and the pressure to achieve made it very difficult for him to achieve a passing score. While taking the exam he realized that while the terminology was familiar to him, he was not prepared to pass it and a certain

amount of "panic" set in which he believes made his score even lower than it would have been without this pressure.

Mr. Ewing reminded the Board of the time and effort he had already invested in the Program and his deep desire for a career in medicine. He cited the excellent clinical work that he has done circulating a patient work-up he had prepared in the Clinical Studies 400 course which had been described as excellent by Dr. Faith Fitzgerald and a recent paper prepared during his clerkship. These plus his honors grade in the Introductory Clerkship, Mr. Ewing said, was evidence of the level of clinical work of which he was capable. He asked for a second chance at the National Board test with adequate time to prepare.

Several of the Board members then asked Mr. Ewing questions. Dr. Murphy noted that a number of students in the Program have had very severe personal crises in their personal lives which had not affected their work to the degree that had Scott's and wondered why this had had such an impact on him. Mr. Ewing replied that the long-term nature of the relationship and the fact that he had changed classes twice in the Program made his situation somewhat unique. Dr. Gershowitz noted that there were numerous instances in Mr. Ewing's record of having incompletes and make-up examinations to achieve a passing grade. He expressed concern that this pattern seemed to be continuing up to the present. Mr. Ewing agreed that this had been a pattern and he explained that it might be due to a lack of maturity, but stressed the fact that he had learned a great deal during this past year about himself and felt that the previous tendency to put things off and not be well prepared was now past him.

Dr. Friedman asked if Mr. Ewing had been aware of the meaning of the letters that he had received which advised him that further deficiencies would lead to his being dropped from the Program or would be grounds for dismissal from the Program. Mr. Ewing said he was well

aware of what those meant and in fact this had led to his being "under the gun" during his last two years in the Program. He reiterated that this may have been one factor in his low performance on the National Board examination because he realized the critical importance of passing.

There being no further questions, Mr. Ewing summarized his situation by reviewing the particular reasons for his poor performance during the past term, the evidence from his work of his ability to perform at the clinical level and his strong desire to continue toward a career in medicine. Mr. Ewing left the meeting.

The Board discussed the presentation and the situation. Dr. Reed noted that the question before the Board was "Are there circumstances that would make the Board reverse the stand taken in letters to Mr. Ewing regarding further deficiencies and the vote of the Board at the previous meeting to drop him from registration"? Board members expressed concern about his overall record and the pattern of his academic performance. His outstanding writing ability was noted by several Board members as a factor in his patient write-ups which have been graded highly by clinical instructors. It was also noted that the crisis during the early part of the Winter term seemed to have had a major effect on his ability to perform in his academic work but that he had not sought any help in resolving these issues. It was moved and seconded that the previous action to drop Mr. Ewing from registration in the Program be reaffirmed. The motion carried unanimously. The Board adjourned at 2:45 p.m.

Respectfully submitted,

/s/ Robert E. Reed
Robert E. Reed, M.D.
Associate Dean
Director, Integrated
Premedical–Medical Program

RER:cw

DEFENDANT'S EXHIBIT NO. 17

THE UNIVERSITY OF MICHIGAN
Integrated Premedical–Medical Program
Ann Arbor, Michigan 48109

August 1, 1979

Scott Ewing
30 Catspaw Cape
Coronado, CA 92118

Dear Scott:

The Phase II Promotion and Review Board, at its July 25, 1979 meeting, approved your request for an irregular program but did not approve the schedule outlined in your letter. The Board expressed concern over your record in the program, noting that you have not completed a full academic load during most of your terms. The Board voted, in view of this performance and the fact that this will be your second irregular program, to allow you to follow a reduced schedule for the 1979-80 academic year, repeating the Microanatomy and General Pathology 506 course in the Winter Term of 1980, and taking the Neuroscience I 509, Developmental Anatomy 508, and Philosophy 644, the Ethics course (formally in the Year VI schedule) in the Spring Term of 1980. In the 1980-81 academic year you must take the full I-4 curriculum, including an elective in both Fall and Winter Terms. The exact schedule for that year will be:

FALL 1980

Human Illness 630	7
Neurosci II 609	3
Pharm 626	3
Elective	3
	16

WINTER 1981

Human Illness 640	9
Pharm 627	2
Clin Studies 510	1
Electives	3-5
	15-17

SPRING 1981

Human Illness 650	3
Intro clkship	3
(July)	—
	6

The Board further stipulated that independent research, while commendable, may not be substituted for the elective requirements.

The Board also asked that you be reminded that you need seven more hours of electives to meet the basic requirements for promotion to Phase III. You should have no trouble meeting these requirements over the next two years. You should also be aware that the Inteflex curriculum must be completed in a maximum of eight academic years. The Board also specified that any further academic deficiencies will lead to your being dropped from registration in the Inteflex Program.

If there is anything that I or the Inteflex Staff can do to assist you in following the outlined program of study, please do not hesitate to call on us.

Sincerely,

/s/ Robert E. Reed
Robert E. Reed, M.D.
Associate Dean
Director, Integrated
Premedical–Medical Program

DEFENDANT'S EXHIBIT NO. 18

THE UNIVERSITY OF MICHIGAN
Integrated Premedical–Medical Program
Ann Arbor, Michigan 48109

September 12, 1979

Scott Ewing
1010 Catherine #602
Ann Arbor, Michigan 48104

Dear Scott:

As we have already discussed, the Inteflex Phase II Promotion Board at its meeting on August 23, 1979, voted to deny your appeal of the requirement that you take the fourth year curriculum of the program as a unit rather than spreading it over two years as you requested. The Board again expressed concern about your over-all record and because of this felt that you should carry a full program load during the 1980-81 academic year. While recognizing that your proposed program would have allowed time to pursue a two-year research endeavor, the Board noted the absence of any concrete plans for such a long research project. The previously stipulated schedule gives you a full calendar year to carry out your research interests and the Board believed this is an adequate amount of time for such work.

The letter you received after the July meeting of the Board was therefore reaffirmed as the Board's decision regarding your irregular program schedule and future requirements. I will not repeat those stipulations here. As before, if there is anything that I or members of the Inteflex administrative staff can do to assist you in planning your schedule, please do not hesitate to ask.

Sincerely,

/s/ Robert E. Reed
Robert E. Reed, M.D.
Director, Inteflex

DEFENDANT'S EXHIBIT NO. 19

THE UNIVERSITY OF MICHIGAN
INTEGRATED PREMEDICAL–MEDICAL PROGRAM
Ann Arbor, Michigan 48109

July 30, 1980

Mr. Scott Ewing
1010 Catherine
#203
Ann Arbor, MI 48104

Dear Scott:

The Inteflex Phase II Promotion and Review Board at its July 25, 1980 meeting was sorry to learn that you must take a re-examination in Neuroscience 509. The Board was concerned that this may be an indication that the problems that previously led to your irregular schedule and difficulty in completing course work might be returning. The Board wished me to note these concerns to you and to remind you that any further deficiencies in the program would be grounds for your dismissal from registration.

If there is anything that I or the Inteflex staff can do to assist you in meeting this makeup examination or in your fall scheduling, please do not hesitate to ask.

Sincerely,

/s/ ROBERT E. REED
Robert E. Reed, M.D.
Associate Dean
Director, Integrated
Premedical–Medical Program

DEFENDANT'S EXHIBIT NO. 49

(Excerpts from Medical School Executive Committee meeting minutes, August 27, 1981.)

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Dean Gronvall asked Dr. Reed to provide background information on the appeal by Scott Ewing. Dr. Reed noted the material distributed to the Executive Committee under separate cover and the addendums to the appeal requested by Mr. Ewing. Dr. Reed proceeded to provide a brief summary of Mr. Ewing's background and the issues related to his appeal. Mr. Ewing was admitted to the Inteflex Program in the fall of 1975 and completed the first two years of the program in three calendar years, being on leave for one year. During the second two-year phase of the program, Mr. Ewing was required to go on an irregular program because of an academic deficiency in the Microscopic Anatomy/General Pathology course. At that time he was advised that any further deficiencies would be grounds for dismissal from the program. Dr. Reed conceded that it is unusual to give such a warning after one failure but that, in this case, the decision was based on his total record. Mr. Ewing completed the coursework of the second two-year phase, however, he failed to achieve a passing score on Part I of the National Board of Medical Examiners (NBME) test taken in June of 1981. At its July meeting the promotion review board voted to dismiss Mr. Ewing from the program in view of his previous warning and failing score.

Mr. Ewing, accompanied by Drs. Robert Anderson and Robert Shott, arrived at the meeting. Dr. Anderson provided some comments on Mr. Ewing's situation, particularly as it related to his intellectual capabilities, his history of psychological problems, the need for counseling, and the external elements which have impacted on Mr. Ewing's

performance. Dr. Anderson highlighted Mr. Ewing's excellent performance in the second year of Medical School, his excellent ratings on the Introductory Clerkship, awards received, his interest in the clinical side of medicine, the six years of investment, and stressed that Mr. Ewing is not requesting readmission to the University of Michigan but is requesting the opportunity to re-take the National Board of Medical Examiners test. Mr. Ewing believes that he can succeed on the NBME but recognizes that his efforts will have to be coupled with intensive counseling. Dr. Anderson concluded his remarks by pointing out that the Medical School should attempt to rehabilitate Mr. Ewing rather than punish him and that Mr. Ewing has the capability of becoming a superior clinician.

Dr. Shott expressed the belief that the capacity and interest to succeed in medicine resides with Mr. Ewing and that Mr. Ewing's problems can be overcome based on his own difficult experience in the pre-clinical years. Dr. Shott added that at the critical junction in Mr. Ewing's career it would be unjust and unwise to deny him the opportunity to develop clinically, particularly based on his clinical performance to date.

Mr. Ewing highlighted a number of points made in his written presentation including the fact that he is not requesting that the Executive Committee overturn the promotion and review board's decision, but that he be granted leave of absence status so that he can take the NBME test a second time. He added that the leave of absence would also allow him an opportunity to acquire additional psychological counseling. Mr. Ewing stressed that the consequences for him were significant whereas they were limited for the Medical School. Mr. Ewing conceded that he has always been more interested and motivated in the clinical activities vis-a-vis the basic sciences, although he recognizes that they represent a required hurdle. Mr. Ewing pointed out that Drs. Anderson and Shott represented two

respected clinicians who know him personally and that the Executive Committee should give appropriate weight to their comments in reaching a decision.

Mr. Ewing indicated that upon receipt of his scores on the NBME test, he approached Dr. Reed about the possibility of re-taking the test. Mr. Ewing stated that Dr. Reed at that time foresaw no difficulties in re-taking the test; Mr. Ewing said this precluded him from taking an immediate leave of absence and thus avoid dismissal. Dean Gronvall noted that leaves are not used to block promotion board actions during such a period. Mr. Ewing responded that this conclusion was based on discussions with Dr. Gibson. Dr. Reed stated that Mr. Ewing's account of his comments was accurate but that had Mr. Ewing asked for a leave at that point, it would have been denied.

Dr. Abrams asked Mr. Ewing whether or not there have been any procedural problems through the various hearings and appeals. Mr. Ewing responded that for the most part there had been no problem with the exception that he was denied the opportunity to speak on his own behalf in his appeal of the failure in the Microanatomy and General Pathology course.

Dr. Winans asked what Mr. Ewing felt was necessary to pass the NBME test given his apparent problems with the basic sciences. Mr. Ewing expressed the belief that his problems have arisen as a result of life circumstances and his inability to cope with them rather than his ability to master the basic sciences. He added that the psychological counseling represents the cornerstone to being successful on the NBME test. Dean Gronvall asked why another year of counseling is required prior to taking the test. Mr. Ewing responded that the test is only offered twice a year and that he is not eligible for the September test, but added that he could perhaps take a shelf examination at an earlier time.

Dean Gronvall asked Mr. Ewing what his understanding was of the level of importance of his performance on the NBME test prior to the test. Mr. Ewing responded that the issue is addressed in the addendum to the appeal and that he considered all examinations to be important but that he was unsure of what constituted a deficiency. Mr. Ewing added that he was aware that he was subject to dismissal if he failed the Microanatomy course for a second time, but that he did not know a failure in the NBME was grounds for dismissal, although it had crossed his mind. Mr. Ewing conceded that it was perhaps poor judgement to take the National Board exams at that time and that it reflected an eagerness to get into the clinical aspects of medicine.

Dean Gronvall asked Mr. Ewing to comment on the dismal performance on the NBME test. Mr. Ewing responded that the pressure of the exam resulted in the surprisingly low scores and that he is aware that a thorough review of the basic sciences is required. Mr. Ewing added that at the same time, however, this does not mean that he has learned nothing in the basic sciences as demonstrated by his performance in the clinical activities. Dean Gronvall stated that the Medical School tends to view the NBME as setting a minimum level of performance and asked Mr. Ewing whether he thought the public would accept the fact that, in his case, it requires one year further preparation in order to demonstrate a minimal level of performance. Mr. Ewing responded that 10-15% fail the NBME test the first time they take it, and added that he was at a disadvantage due to the fact that he was forced to take a full load of courses in the past year. Other students taking a lightened load had more time for preparation. He added that in the past when he has been given an opportunity to correct a deficiency that he had been successful. Dr. Abrams asked why he became so involved in other activities when he was having problems in the basic science coursework. Mr. Ewing

explained that the promotions and review board indicated that he must take a full load and that he had, therefore, scheduled the independent writing course and in that course made a commitment to the instructor to enter the writing contest. Mr. Ewing added that he did not anticipate the problems with his girlfriend.

Dr. Anderson agreed that Mr. Ewing's record is checkered and that all the deficiencies cannot be justified but noted that there have been significant events in his life that have affected his ability to perform at those times when his record is particularly poor. Dr. Anderson added that it was a mistake to take the NBME test at that time and that this may reflect the lack of counseling available to the medical students.

Dean Gronvall pointed out that part of the responsibility of the Medical School is to the public to ensure that an individual has demonstrated the ability to perform intensively over a period of time. Mr. Ewing responded that by accepting his appeal it does not necessarily mean a vote of confidence but rather merely provides an opportunity to prove to himself whether or not he can continue his medical career. Mr. Ewing concluded his remarks by adding that he recognizes that the pressures in the clinical setting are significant, but that he had demonstrated the ability to handle these and that the clinical instructors have been unanimous in their endorsement. Mr. Ewing and Drs. Anderson and Shott left the meeting at this point.

The Executive Committee then discussed the comments by Mr. Ewing and Drs. Anderson and Shott in some detail. Concern was expressed with Mr. Ewing's record over time which indicated Mr. Ewing's inability to handle stressful situations and set realistic priorities.

Dean Gronvall asked Dr. Reed if there were any other pieces of information that the promotion board considered germane. Dr. Reed responded that the board's prime con-

cern was the evidence of continued problems in spite of seven years of time post-high school and previous counseling and therapy. Because of this record the board had placed him on warning and did not find the circumstances adequate reason to reverse that decision. Dr. Reed added that Mr. Ewing's failure to seek help related to the problems with his girlfriend and academic performance in the past year, despite the fact he had experienced help from therapy in the past was troublesome.

The Executive Committee unanimously approved a motion to deny Mr. Ewing's appeal for a request for a leave of absence status.

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DEFENDANT'S EXHIBIT NO. 50

(Excerpt from EXECUTIVE COMMITTEE MEETING Minutes of June 17, 1982)

The appeal for readmission of Mr. Scott Ewing was introduced by Dean Gronvall stating that Mr. Ewing was aware of the absences of several committee members but that he had elected to appear before the Committee in spite of this. An additional piece of material (a May 12, 1982 letter from Dr. Reed to Dean Gronvall) was distributed to the Executive Committee upon request of Mr. Ewing.

Dr. Taren reviewed the chronology of events in Mr. Ewing's dismissal. Dr. Reed reviewed the allegation of Mr. Ewing's lawyers regarding unfair treatment in that he was not allowed a second opportunity to take National Boards. Dr. Reed noted that students are given second opportunities to re-take National Boards or courses if it is the first failure in the exam or course. This does not happen if they have been issued a warning about further deficiencies. Students have been dropped from registration after a first course failure when they were in a warning or probationary status.

When asked by Dr. LoBuglio regarding his opinion as to why Mr. Ewing has had so much difficulty, Dr. Reed stated that he wished to remain neutral in the discussion. He indicated he would clarify statements or chronology of events but believed he should not influence the deliberations beyond the statements made in the letters he had written. (Dr. Herrmann left the meeting). Mr. Ewing joined the meeting.

Dean Gronvall reiterated Mr. Ewing's decision to appear at the Executive Committee knowing that there were absences. Mr. Ewing acknowledged that he knew this fact but had elected to come. Mr. Ewing began by distributing

a copy of letters from the faculty (Drs. T. Davies, 1-6-82; R. Anderson, 12-15-81; S. Baker, 12-15-81; F. Bergman, 2-18-82) in support of his qualifications. (Dr. Gibson joined the meeting).

Mr. Ewing asked that the following comments from his reappeal packet be entered into the minutes:

> "Scott was quickly identified as a particularly conscientious and hard-working student who went well beyond the required norm in background reading and documentation pertaining to the patients assigned to him. . . . I had no hesitation in endorsing an honor grade for him. . . . It is very evident to me that this young man is capable of outstanding work.
>
> Terrence C. Davies, M.D.
> Professor and Chairman
> Dept. of Family Practice

"Scott stood out in the group. . . . He seemed to immerse himself in the excitement of clinical work and performed in outstanding fashion. I agree with Dr. Davies' decision to grant him honors on the rotation.

Michael Liepman, M.D.
Assistant Professor of
Family Practice and
Psychiatry

"I have been a clinical instructor at the University of Michigan Medical School for the past fifteen years and have had the opportunity to closely observe students as they come and go. . . . I believe Scott will be an asset to a medical school of the highest caliber. . . . Scott is destined to be a superior clinician.

Robert E. Anderson, M.D.
Clinical Instructor
Dept. of Internal Medicine"

He asked that the decision by the Executive Committee be based on "new information". Mr. Ewing stated that he is reapplying to be allowed to take National Boards and that if he passes, he would then be reinstated as a student in good standing. He would then take the 1982-83 year off to apply for transfer to other medical schools. Mr. Ewing stated that he would make every possible effort to transfer but that if he did not gain admission to another University, he would return to Michigan to complete his medical training. Dean Gronvall requested clarification; that Mr. Ewing was not applying for a "limited admission" but rather to be considered a student in good standing with the option of returning to Michigan. Mr. Ewing responded affirmatively.

The issue of the number of years it took Mr. Ewing to complete the first two years of the Inteflex Program underwent extensive discussion. Mr. Ewing denied that he took reduced loads explaining that he did not take Inteflex courses in the winter of 1977 because the Promotion Board had prevented him from doing so. Dr. Reed pointed out that Mr. Ewing completed the first two years in three calendar years being on leave away from Michigan for part of that time during which he took two required physics courses and taking non-Inteflex LS&A courses during the 1977 winter term, which counted towards the required bachelor's degree. Mr. Ewing stated that with advanced placement courses he did not actually need the 1977 winter term courses to meet his degree requirements. Dr. Reed summarized that he saw the problem as a matter of semantics not facts, with the difference being how one viewed the difference between LS&A and Inteflex courses. Dean Gronvall stated that in his view the LS&A and Medical School requirements cannot be separated in an integrated program such as Inteflex.

Discussion ensued regarding deficiencies in Neuroscience and Pharmacology. Mr. Ewing stated that in both cases, Drs. Ross and LaDu had suggested retaking the exam for his (Ewing's) best interest. In response to questions from the Committee regarding why Mr. Ewing displayed such uneven performance, Mr. Ewing stated that he lacked maturity, and was not able to recognize the significance of the basic sciences and their application to the clinical sciences. He further stated that he had been extremely disillusioned with the Inteflex Program in the emphasis it placed on science rather than the humanities and on the attitudes and behavior of his classmates.

In answer to questions regarding his poor performance on the National Boards Part I, he cited extreme pressure and anxiety related to taking the Pharmacology make-up exam just a few weeks before the National Board test and the fact that he had to pass that exam before the Promotion Board would declare him eligible to take the National Boards. In answer to questions regarding his exact scores, Dr. Taren read from Mr. Ewing's record that he had achieved passing marks in only two out of five areas (Pharmacology and Behavioral Science). His total score was 235 with the breakdown of scores as follows: Anatomy, 220; Physiology, 230; Biochemistry, 265; Pathology, 295; Microbiology, 175; Pharmacology, 400; and Behavioral Science, 420.

In discussing the reasons behind the Board's issuance of the warning regarding further deficiencies, Mr. Ewing stated that he feels the Promotion Boards dealt with him more harshly than other students and speculated that perhaps they expected greater achievement based on his credentials. He said that he has not consistently failed and there is nothing wrong with him psychologically other than being immature. He acknowledged that he did not act appropriately in response to his academic problems and that in retrospect an accelerated program was probably

not the best for him. Mr. Ewing stated that he pursued his own interests rather than academic areas chosen by the School as being important. Mr. Ewing stated that he had become disillusioned about his experiences here but offered no explanation (in response to a question) as to why he had not transferred.

In answer to a question posed regarding opportunities to appear before Promotion Boards, Mr. Ewing responded that he could not say how many times he had but that he was denied an opportunity to speak to the Board when he had the failure in Microanatomy and subsequently when he appealed that grade. (Dr. Reed later reported to the Executive Committee that the Inteflex Promotion Boards do not invite students to join the meetings unless they are at risk of being dropped from registration.)

In response to Dr. Agranoff's question about the compatibility of Mr. Ewing's creative talents in combination with the technical aspects of being a physician, Mr. Ewing responded that he felt the two were "very compatible". He added that he wished to utilize his writing skill as a physician and cited two examples of physicians who had done so. He further stated that writing is his avocation reiterating his primary goal to become a physician.

Some discussion ensued regarding Mr. Ewing's counseling experiences. He reported that during his first year he had five visits with Dr. Smokler followed by more intense counseling in San Diego with a clinical psychologist while on leave of absence. He stated his awareness of his inability to adapt to his environment during his time as an Inteflex student. Dr. LoBuglio pointed to some inconsistency in Mr. Ewing's statements regarding his "panic reaction" prior to the National Boards which Mr. Ewing said influenced his poor performance and his apparent appropriate and conscientious behavior on his clinical rotation with Dr. Liepman just two or three weeks later.

Mr. Ewing responded by saying that the circumstances leading to his poor performance on Boards had been cumulative, that moving to a different apartment had helped create a new and "refreshing" atmosphere and approach and that he found the clinical experience very stimulating and rewarding.

As there were no further questions, Dean Gronvall asked Mr. Ewing to make any final comments he wished. Mr. Ewing asked that everyone recognize the impact of their decision on his future and added that, although he could request a third opportunity to pass the Boards, he would not do so if given a second opportunity to pass and he failed.

Mr. Ewing asked when a decision would be reached, and Dean Gronvall reported that the Committee would be deliberating on the case but could not give a specific date. Mr. Ewing left the meeting.

Dr. Reed clarified Promotion Board procedures regarding student attendance at meetings. Further discussion ensued regarding perceived changes in Mr. Ewing's maturity level as well as the potential incompatibility between his approach to his academic work and the disciplined work required of physicians. Dean Gronvall commented that the question is that Mr. Ewing had not met the requirements for promotion and retention as prescribed by the faculty of the Medical School. He stated that while Mr. Ewing is asking the Committee to judge his potential, in fact, schools make judgments based on performance. Further discussion ensued regarding the unevenness of his performance as well as the feeling that Mr. Ewing has perceived his deficiencies to be minor in nature while the School has viewed his deficiencies to be of enough magnitude to issue warnings and finally to drop him from registration.

In concluding this item, Dean Gronvall asked if any additional material should be obtained from the Executive Committee to reach a conclusion. It was agreed that the records provided complete information to make a decision.

Dean Gronvall stated that he would give the Executive Committee time to review the information and vote on the matter at a future meeting.

Dean Gronvall adjourned the meeting at 3:00 p.m.

DEFENDANT'S EXHIBIT NO. 51

(Excerpt from EXECUTIVE COMMITTEE MEETING Minutes of July 29, 1982)

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The Committee initially addressed item 3, "Scott Ewing Reappeal". Dean Gronvall provided an overview, noting his recent letters which had been circulated. Mr. Ewing was then welcomed to the meeting.

Mr. Ewing began his comments, noting that he had wanted to be able to respond to the June 7, 1982, meeting summary in written form, but was not given the summary until two days before this session. Mr. Ewing stated that he did not believe the minutes of the June 17, 1982 meeting accurately reflected his comments. He also made several comments regarding that meeting noting that he was not made aware of member absences until 10:30 a.m. on that day and specifically that he was unaware that Dr. Dalston was going to be absent. He also was unaware that no vote was going to be taken that day.

Mr. Ewing asked Dr. Taren to confirm that he (Dr. Taren) had called him to voice concern over the expected absences. Dr. Taren confirmed that he had called Mr. Ewing to inform him of expected absences and that Mr. Ewing had reaffirmed his wish to appear before the Committee despite the absent members.

Mr. Ewing went on to read quotes by Dr. Reed from a Promotion Board meeting indicating that a failure in a course was not sufficient grounds for dismissal. Dr. Reed agreed that students are not dismissed after the first failure of a course unless the student had previously been warned that further deficiencies would lead to dismissal. A number of students in that position have been dropped without the opportunity of repeating the course. In response to a question from Mr. Ewing, Dr. Reed said that there was no time limit on such warnings.

Mr. Ewing proceeded to describe what he considered to be correct depictions of his comments that were not reflected in the June 17 meeting summary. On page 8450 (paragraph 3) he noted that the phrase, "he lacked maturity" was incorrect and that he had indicated that extensive extracurricular pursuits were the basis for poor, uneven performance. Mr. Ewing commented that he accepts the responsibility for overextending himself, although he regards the added activities as components in his overall medical training. He ended these comments conceding that immaturity may have had a role in his performance.

On page 8452 (paragraph 3) Mr. Ewing paraphrased a quote from Dean Gronvall that students are not judged on potential but on performance. Mr. Ewing agreed with the meaning of that statement and read several letters (excerpts) from faculty (Davies, Vander, Liepman) which praised his ability to perform in the clinical setting. Others made similar favorable comments, and Mr. Ewing stressed that this record was the basis for his request—not his potential. Mr. Ewing said that, given the comments about his clinical performance (not potential) he believed that he deserved another opportunity to prove himself by taking a second National Board examination. He noted that there was no fair way to adjudicate the situation other than to take a second exam. Mr. Ewing added that other students had failed more classses than he or had been given three chances (in some cases) to pass the Board exam.

Mr. Ewing continued, highlighting what his options would be if allowed to take a second examination:

1. *If he fails,* he indicated that the earlier decision of the Executive Committee to refuse his request for readmission would be vindicated.

2. *If he passes,* he will make every effort to transfer to other medical schools.

3. *If he passes,* and cannot get into another school, he will re-register here at the University of Michigan.

Dean Gronvall asked if there were any questions. The Committee did not have any questions, but Dr. Reed did have a comment for clarification. Dr. Reed pointed out that he disagreed with Mr. Ewing regarding the reason Mr. Ewing did not take the Introduction to Patient Care course in the spring of 1976. On the second page of the July 29 letter to the Committee, Mr. Ewing said that Dr. Reed's statement regarding the reason for Mr. Ewing not taking the Introduction to Patient Care course was not true. Mr. Ewing's comments indicated that the reason he did not take the course was that he had not matched with a preceptor. Dr. Reed quoted from the Promotion Board meetings of May 7 of that year where he stated that Mr. Ewing had been placed on an irregular program because he had not completed the work of the winter semester. The Promotion Board had confirmed this irregular program and stipulated that Mr. Ewing must make up the incomplete work during the month of May.

Mr. Ewing repeated his statement that the reason he did not take the course was the absence of a preceptor for him. Dr. Reed indicated that while the event was several years in the past, and he did not consider it to be a major issue in Mr. Ewing's application, his memory was still quite firm regarding the situation.

In his closing comments, Mr. Ewing questioned why the Committee had been so concerned with his entire six-year history and not as much on the new information that had been collected and submitted during the past year. He added that most of the new information (laudatory comments) was submitted by respected University of Michigan faculty. He commented that he feels that he was placed in the defensive and did not anticipate this posture.

Dean Gronvall responded that the intent of the Committee is to make sure that all evidence has been reviewed in order to make informed decisions. Mr. Ewing had no further comments and left the meeting.

In beginning discussion, Dean Gronvall focused the question to the Committee, "was the earlier decision of the Executive Committee proper or not?". The Committee made several comments and raised some questions. Dr. Kelch said it was his impression that, while Mr. Ewing appeared to take an inordinate amount of time to complete coursework, he achieved good grades once the work was completed. He asked Dr. Reed if that was a fair assessment and to comment on his record. Dr. Reed agreed, in general, with Dr. Kelch's statements. He added that Mr. Ewing's performance had been uneven and his overall record was the reason he had been given a warning regarding further deficiencies after his first deficiency in the General Pathology and Microscopic Anatomy course. Subsequently, he had a barely passing grade in Human Illness and required a make-up exam in Pharmacology just prior to his failure on the Boards.

Dr. Krause asked for clarification regarding taking National Board exams a second time. Dr. Reed stated that students in good standing are routinely given the opportunity of re-taking a course or National Boards but that being placed on formal warning negates this standard practice. In response to a question, Dr. Reed commented that Mr. Ewing was allowed to take the introductory clerkship after taking the Boards because the grades on the Board exam are not received until near the end of the clerkship in mid-July.

In ensuing discussion, Executive Committee members noted the decision should be based on Mr. Ewing's record and not on the style of presenting oral and written material before the committee. Dean Gronvall noted that his

interactions with Mr. Ewing during the reapplication process raised grave doubts in his mind about Mr. Ewing's ability to assume responsibility as a physician. This, in addition to the overall record, had led him to the conclusion that it would not be a correct decision to readmit Mr. Ewing to the Medical School.

The Executive Committee members supported Dean Gronvall's conclusion. There was a motion to deny Mr. Ewing's request for readmission to the Medical School. The vote was unanimous to deny Mr. Ewing's request.

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DEFENDANT'S EXHIBIT NO. 52

(Summary of Students Dropped from Inteflex Program)

Date Dropped—Student—Circumstances

7/25/75—1—Dropped after multiple deficiencies in 1st two years; no warning letter.

9/9/75—2—Dropped by LS&A.

12/31/75—3—Warning letter for one deficiency; received one more deficiency and dropped.

12/31/75—4—Warning letter; multiple deficiencies; second failure in same course; dropped.

5/7/76—5—No warning letter; LS&A dropped; multiple program deficiencies; dropped from program.

5/10/76—6—Warning letter; received another deficiency and dropped.

7/14/76—7—Warning letter; received another deficiency and dropped.

7/21/77—8—Warning letter; received another deficiency and dropped.

1/10/78—9—Warning letter; dropped by LS&A

5/15/78—10—Warning letter; second deficiency in same course; dropped.

1/8/79—11—Letter of concern after deficiencies in 2nd sem.; Fall in 2nd year had deficiencies in all courses and dropped.

5/7/79—12—Dropped from LS&A while on leave; Inteflex dropped since did not meet conditions of leave.

1/12/81—13—Warning letter; dropped from LS&A; Inteflex dropped since did not meet conditions of leave.

5/11/81—14—Failed a course and then withdrew from same course the second time; dropped.

5/20/81—15—Concern expressed after 1st term; after 2nd term had four program deficiencies and dropped.

7/21/81—16—Warning letter; failed another course and dropped.

7/31/81—17 (Ewing)—Warning letters; failed NBME Part I, dropped.

7/28/82—18—Warning letter; second deficiency in same course; dropped.

1/79—19—Warning letter; failed course for second time and resigned just before being dropped.

1/8/82—20—Warning letter, failing another course and resigned just before student was dropped.

(5)

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No. 84-1273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

v.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONER

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59pp

QUESTIONS PRESENTED

I. Does the Eleventh Amendment, as construed by a line of decisions culminating in this Court's decision in *Pennhurst State School and Hospital* v. *Halderman,* bar the federal courts from ordering state universities to administer examination retests to students from other states who have been determined to be academically unqualified?

II. Is a state medical school's procedurally correct dismissal of an academically deficient student subject to substantive due process review and reversal by the federal courts?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1273

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

v.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. at 28a-33a)[1] is reported at 742 F.2d 913. The opinions of the District Court are reported at 552 F.Supp. 881 (Pet. App. at 4a-11a) and 559 F.Supp. 791 (Pet. App.

[1] Record references (Tr. I, II or III, Suppl. Tr., PX and DX) are to volumes I, II or III of the trial transcript, the supplemental trial transcript of closing arguments, plaintiff's trial exhibits and defendant's trial exhibits, respectively. Where appropriate, references are also made to those parts of the record reproduced in the Joint Appendix (J.A.) and the Appendix to the Petition for Certiorari (Pet. App.) filed with this Court.

at 12a-27a). Only the District Court's latter opinion was appealed to and reversed by the Sixth Circuit.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered on September 6, 1984 (Pet. App. at 28a and 34a). A petition for rehearing *en banc* was denied on October 31, 1984 (Pet. App. at 35a). The petition for writ of certiorari, filed on January 30, 1985, was granted on March 25, 1985. Jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eleventh and Fourteenth Amendments to the Constitution of the United States, Section 1983 of Title 42 of the United States Code, and Section 5 of Article 8 of the Constitution of the State of Michigan, which are set forth in the appendix to the petition. Pet. App. at 2-3.

STATEMENT OF THE CASE

Respondent Scott Ewing's claim under 42 U.S.C. § 1983 challenges the unanimous committee decisions of petitioner's Medical School faculty to drop him from registration as a student in the school's special Inteflex program. Ewing contends that the faculty's decision, although based on an extensive and considered review of his entire academic performance and concededly fair on procedural grounds, violates his right to substantive due process merely because other students were allowed more than one opportunity to sit for a comprehensive examination while he was not. The Court of Appeals for the Sixth Circuit agreed with Ewing. It held that the faculty's professional assessment of Ewing's academic qualifications must yield to the court's mandate that Ewing be allowed to retake the comprehensive examination and, if he passes, be reinstated in the Medical School. Pet. App. at 33a.

A. The Inteflex Program

Respondent Scott Ewing first enrolled in the Medical School's Inteflex program in the fall of 1975. J.A. 14. The Inteflex program, open only to recent high school graduates, combined both undergraduate and medical courses of study into a rigorous six-year curriculum.[2] DX 35-40. The Medical School also offers a standard four-year M.D. program and a seven-year combined M.D./Ph.D. program for students who have already received a four-year baccalaureate degree. *Id.* Requirements for admission, curricula, and promotion standards differ among these various programs, so that Inteflex students are evaluated separately from other students. J.A. 36. According to Associate Dean for Education Affairs James A. Taren, M.D., Inteflex students were "a separate group", and comparing them academically with students in the standard program would be like "comparing apples with oranges." *Id.* At the time of Ewing's enrollment, Inteflex students took only one of their Phase I and Phase II academic courses with students from the standard program. Tr. I at 125.

The Inteflex program consists of three two-year phases, each of which a student must complete to the faculty's satisfaction before being allowed to progress to the next phase and to graduation. Tr. I at 146-147. Phase I of this curriculum includes undergraduate-level

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[2] Students currently enrolled in Inteflex pursue a seven-year program.

science and humanities courses, mostly prescribed but with some electives. Phase II primarily consists of basic medical science courses, but also includes some undergraduate-level courses as in Phase I. Phase III, in which Inteflex and standard students interact academically for the first time, is comprised of required and elective clerkships in a hospital setting. Students in all programs are required to pass a comprehensive examination of their basic biomedical knowledge, the National Board of Medical Examiners (NBME) Part I Examination, before they are allowed to enter this final clinical stage of their education. J.A. 72; Tr. I at 147, DX 35-40.

The academic performance of the Inteflex students is closely monitored and reviewed at regular intervals by the Inteflex Promotion and Review Board. DX 36 at 15. This board consists of approximately fifteen Inteflex faculty and course directors. J.A. 135. During the first two phases, it functions independently of the faculty boards which assess and monitor students in the other programs. J.A. 31-32. The Medical School bulletin in effect at the time Ewing first enrolled emphasized the faculty's reliance on this exercise of its collective academic judgment:

> The Promotion Boards can, at their discretion, approve advancement, require the student to repeat all or part of a year's work, refuse further registration, or take whatever action they may deem appropriate in an individual instance. [DX 36 at 34.]

The various faculty boards consider each student on an individual basis to assure that qualified students remain in registration. Tr. III at 281. Thus when a student encounters academic difficulty, his or her total

performance in the program, and not just the isolated problem area, is evaluated by the board during its deliberation and in its direction of remedial action. Tr. III at 196. However, while the circumstances of each student are often the subject of anguished concern, the faculty boards will if necessary fail those students who are not qualified to continue. Tr. III at 196-197.

More than six hundred medical doctors and Ph.D.s comprise the faculty of petitioner's Medical School but none has access to any student's docket [3] in the Dean's Office unless they also have membership on a Promotion and Review Board and are considering the academic records of a student in academic difficulty. Tr. III at 198. Thus, nearly all faculty members have no actual knowledge of how any of their students are doing in any other class. This serves as a check and balance against subtle or subconscious influence in grading. *Id.*

To further ensure the integrity of the decisionmaking process, students dissatisfied with action taken by a faculty board are provided with an appeal mechanism. A student may appeal any grade directly to the professor and may also petition a faculty board to reconsider its decision, and make a final appeal to the Medical School's Executive Committee. DX 36 at 34.

B. Ewing's Academic Record

Ewing's performance in the Inteflex program prior to his dismissal was characterized by multiple academic

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[3] The "docket" is the student's official file, which contains his or her high school, college and Medical School transcripts, all test scores, faculty evaluations, correspondence and so forth.

deficiencies and warnings. J.A. 126-128, 138-139; DX 14. Even though he was repeatedly invited by letter to meet with the Dean if he needed any assistance with his difficulties, Ewing acknowledged that he failed to do so. J.A. 143-146; Tr. III at 36-39. Indeed, Ewing freely admitted that he "wasn't bothered by it" when told that his performance was poor. Tr. III at 32.

As early as his first semester in the fall of 1975, Ewing expressed to a counselor his unhappiness with the University in general and the Inteflex program in particular. Tr. I at 238. That semester he received grades of incomplete in two of his courses. Tr. I at 238; DX 14. During the winter semester of 1976, Ewing enrolled in three courses for 11 credit hours, although the Inteflex curriculum prescribed four courses for 15 credit hours. Tr. I at 239-240, DX 14. Despite his reduced course load, he ended up withdrawing from one course and taking incomplete grades in the other two. Tr. I at 240-241, DX 14.

During the two terms which comprised Ewing's first year of study he completed only six of the eight required courses. Since four of the six courses were concluded belatedly, Ewing satisfied only one-fourth of his first-year coursework in the regular manner. J.A. 48. In May of 1976, the Inteflex faculty board, concerned with Ewing's poor performance, placed him on an irregular program. Tr. I at 241. Two months later the board granted him a leave of absence so that he could pursue other interests. J.A. 52; Tr. I at 243, Tr. III at 33, DX 3.

Ewing returned from his leave of absence for the winter term of 1977. For the next year and a half, while taking reduced course loads, he performed satisfactorily. Tr. II at 12-13, PX 6, DX 14. During this time

period, he was essentially taking only one required science course per term, as compared with the two or more taken concurrently per term by other Inteflex students.[4] J.A. 47. He was promoted to Phase II of the Inteflex Program at the close of the 1977-78 academic year. Tr. II at 14, DX 14.

The difficulties so characteristic of Ewing's first year resurfaced during the 1978-79 academic year. While continuing to take a reduced course load, he received incomplete grades in two of his three classes during the fall of 1978. Tr. II at 15-16, DX 14. Ewing claimed that ill health was partially responsible for his poor performance that semester. Tr. II at 16. He subsequently completed the coursework to remedy one of the incomplete grades, and took a make-up examination to remedy the other. Tr. II at 17-18. In the winter of 1979, while still taking a reduced courseload, Ewing failed Microscopic Anatomy and General Pathology, a fundamental medical science course. Tr. II at 19, Tr. III at 40-45, 261. His appeal to the professor of the "E" grade he received in this course was unsuccessful, and so his failing performance came to the attention of the Inteflex faculty board. Tr. II at 20-21, 24, Tr. III at 70, 266-267, DX 14, 44.

On July 25, 1979, the faculty board, in an attempt to help Ewing progress, placed him on an irregular,

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[4] Dean Robert E. Reed, M.D., Director of the Inteflex program, testified as follows:

> Q: [By Mr. Davis] What is the importance of taking more than one hard science course at a time?
>
> A: It requires, in order to take them at one time, it requires extra • • • focusing efforts and usually considered by [the faculty] Boards as evidence of ability to do just that. Boards regularly express concern if students have not performed at that level. [J.A. 47]

reduced-load program for the second time. J.A. 138. It also directed him to repeat the Microscopic Anatomy and General Pathology course he had just failed, and to complete the remainder of his Phase II curriculum in a prescribed manner and without further deficiency to demonstrate that his previous problems were corrected. J.A. 143-144; Tr. II at 19-20, 63. Ewing appealed the board's imposition of the prescribed program and requested the substitution of a program of his own design, but the board denied the appeal. J.A. 145; DX 18. The letter to Ewing confirming this denial reaffirmed the warning given earlier that any further deficiences would lead to his dismissal. J.A. 144-145; Tr. II at 36.

Ewing took a second leave of absence during the fall of 1979. J.A. 138. When he returned in the winter of 1980, he took a reduced courseload of 10 credit hours, which included repeating the Microscopic Anatomy and General Pathology course he had failed the previous year. J.A. 139; Tr. II at 25; DX 14. During the spring of 1980 he took two courses, receiving an incomplete grade in Neuroscience. As a result, Ewing received a third letter from the faculty board repeating its warning that any further deficiencies would lead to his dismissal. J.A. 146. He subsequently sat for a readministration of the final examination in Neuroscience and passed with a grade of "C." J.A. 127; Tr. II at 26; DX 14.

Ewing satisfactorily completed his fall 1980 coursework. However, he again encountered very serious difficulty during the winter of 1981. J.A. 128. He barely passed his Human Illness course, with the lowest overall score in the class. J.A. 129. In struggling with Pharmacology Ewing failed the mid-term examination

with the lowest score (a 39 out of a possible 100) ever seen by Professor La Du (Tr. III at 196), who agreed that he "bent over backwards to keep [Ewing] in the Program" (*Id.*) by throwing out his mid-term score when arriving at a final course grade. *Id.* at 195-196. Moreover, Ewing failed the final examination in Pharmacology when he first took it but was allowed a retest and was not given a fourth deficiency, which could have led to his dismissal from Medical School. J.A. 128, 139; Tr. III at 166-168.

C. The NBME Part I Examination

Petitioner's Medical School requires all of its students to sit for and pass a comprehensive examination of their biomedical knowledge before they are allowed to begin their clinical training. J.A. 38. This examination, promulgated by the National Board of Medical Examiners, is known as the NBME Part I. The NBME Part I scores are analyzed on a national mean of 500; however, satisfactory performance on the NBME when taken for medical school and not state licensure purposes is defined solely by each medical school's faculty. Tr. I at 190-191, DX 36 at 21. At the time Ewing sat for the examination, the faculty required a score of 345 for promotion to clinical training, although the National Board required a score of 380 for certification for state licensure. Tr. I at 191-192. Failure of the examination is treated as a formal academic deficiency by all faculty boards. J.A. 72; Tr. II at 67.

The NBME Part I is a two-day multiple choice examination designed to test each student's knowledge of and ability to integrate the basic biomedical sciences. Tr. I at 147-148. It tests students in seven subject

areas: anatomy, behavioral sciences, biochemistry, microbiology, pathology, pharmacology, and physiology. PX 4. A student may sit for the examination if he or she is enrolled as a student in an accredited medical school and is considered qualified under the school's particular standards. *Id.* Petitioner's Medical School considers a student qualified to sit for the examination if the student has no outstanding academic deficiencies in course work. In accordance with guidelines set forth by the National Board, the Medical School may allow a student who initially failed the examination another opportunity to pass it so long as the student remains enrolled and is qualified according to Medical School criteria. J.A. 39-40; Tr. I at 159, PX 4.

Ewing sat for the NBME Part I examination in June of 1981, while on warning. J.A. 41, 57. Having no outstanding academic deficiencies at the time, he was qualified to take the examination. J.A. 57, 62. He was, however, still subject to the faculty board's requirement that he complete Phase II of the Inteflex program, which included the NBME Part I examination, without further deficiency in order to remain in registration and be promoted to Phase III. J.A. 145-146; Tr. II at 64.

Ewing failed five of the seven subjects and had a total score of only 235 on the examination, well below the passing score of 345. J.A. 128, 139; DX 14. His failure of the NBME Part I constituted a formal deficiency and thus a failure to complete Phase II as prescribed by the Inteflex Promotion and Review Board. J.A. 72; Tr. II at 64-65. He had been warned that any academic deficiency would lead to his dismissal. J.A. 145-146.

D. Retests on the NBME Part I Examination

The Medical School had not promulgated any rule allowing a retest or a second chance at passing the NBME Part I Examination (J.A. 100), nor did the school have any policy allowing at least one retest where a student failed his first sitting of the examination. J.A. 8. However, it was a "common practice" (J.A. 40) or "standard practice" (J.A. 163) to allow a qualified student the opportunity to retake any examination, whether a course examination or the NBME Part I examination, after one failure. J.A. 8, 30, 39-40, 163. Yet this practice was not self-executing, and was in fact negated where a student was on warning. J.A. 163. Each student's case was placed on the meeting agenda and was separately considered by the appropriate Promotion and Review Board. J.A. 30. The exhibits received into evidence at trial show that many other Inteflex students (unidentified by name) were, like Ewing, also individually considered and evaluated. J.A. 129-132.

As it happened, the respective Promotion and Review Boards, upon individual consideration of each student's academic record, voted to allow 32 standard students (J.A. 107-110) and 8 Inteflex students (J.A. 111) at least one retest of the NBME Part I examination. However, undetermined numbers of standard students and at least 19 other Inteflex students were dismissed from Medical School for academic deficiences without being allowed to take the NBME Part I examination even once. J.A. 53, 165-166.

In the case of every student whose record was studied by a faculty board, the decision of the board was made solely on the basis of each student's record and without regard to what the board had done in

the case of any other student. J.A. 73. In considering Ewing's failure, members of the Inteflex Promotion and Review Board were not aware that every other Inteflex student failing the first administration of the NBME Part I test coincidentally had been granted a second test by the board. *Id.*[5]

E. The Inteflex Faculty Board's Decision To Dismiss Ewing From Registration

The first regular meeting of the Inteflex faculty board subsequent to Ewing's failure of the NBME Part I was on July 24, 1981. J.A. 121. As usual, the agenda included a consideration of the performance of students who had received academic deficiencies

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[5] Pathology Professor Bruce A. Friedman, M.D., testified on this point as follows:

Q: [By Mr. Conway] Are you aware that in the history of the Inteflex Program, no student has ever been dismissed for failing the NBME?

A: No.

Q: That wasn't told to you at the Promotion Board?

A: It's really irrelevant, and I wouldn't have wanted it told to me.

Q: Were you told every other Inteflex Student, in the history of the Program who had failed the first time, was given a second chance?

A: I wouldn't have wanted to be told. It wasn't brought up, and I would have objected had it been brought up.

Q. So, those factors weighed in no way in your consideration as to whether Mr. Ewing should be given a second chance?

A: Not only did not weigh, I would shut my ears to them. It's really irrelevant to the issue.

Q: And—were you also similarly unaware of the fact that each of the 32 Standard students who had failed the NBME Part I on the first occasion, was given a second chance, at least?

A: I had no opportunity to discuss those students, and I consider that irrelevant to my deliberation.

[Tr. III at 280-481.]

since the board's previous meeting. Ewing was one of several students discussed at this meeting. J.A. 121-133.

Ewing's failing score on the NBME Part I examination caused the board members grave concern, and so his individual circumstances were discussed at great length. J.A. 126-128. After reviewing Ewing's entire record, recalling the board's previous warning that he complete Phase II without further deficiency, and finding no extenuating circumstances, the board unanimously agreed that Ewing was no longer qualified to continue and should be dropped from the program. *Id.*

Ewing immediately petitioned the Inteflex board in writing to reconsider its decision and, on July 30, 1981, the board reconvened in special session to do so. J.A. 134. Seventeen faculty members attended (J.A. 135), and Ewing appeared in person to present evidence in support of his request. J.A. 139. Ewing explained that his poor performance was due to a number of factors, including a recent romantic disappointment and inadequate preparation time due to his need to make up his Pharmacology deficiency. J.A. 139-141. He also reminded the board of his intellectual abilities, as reflected by the honors he had been given in a clinical course and an extracurricular literary prize he had received. *Id.* In his written petition, however, Ewing admitted that he oftentimes overextended himself with his extracurricular activities. Tr. III at 109, DX 21. In response to questions from board members, Ewing agreed that he had exhibited a pattern of inadequate performance. J.A. 141. He explained that it may have been due to a lack of maturity, but that such tendencies were now behind him. *Id.* He also stated that he had been fully aware of the meaning of the board's previous warnings, and was "under the

gun" when he took the NBME because he knew that if he failed he could be dropped from registration.[6] J.A. 141-142. The board, however, after extensive reconsideration of all the circumstances, unanimously voted to reaffirm its earlier decision. J.A. 142.

On August 27, 1981, Ewing appealed the Inteflex faculty board's decision to the Medical School's eight-member Executive Committee. J.A. 147. Once again he appeared and presented evidence in support of his position. The Executive Committee voted unanimously to reaffirm the board's decision. *Id.*

On November 24, 1981, Dean Reed offered to permit Ewing to take a "shelf examination." Pet. App. at 20a, Tr. I at 192-195. A shelf examination is an administration of the NBME Part I the results of which at that time could be used for unofficial purposes, such as to support an application to another medical school. Tr. I at 193-194. The shelf examination offered Ewing was not to be used for readmission to any of the University of Michigan's Medical School programs. Tr. I at 194. Ewing chose not to take this shelf examination, and such examinations are no longer given by the Medical School.

Ewing appeared before the Executive Committee on two later occasions, June 17, 1982, and July 29,

[6] Respondent erroneously continues to dispute this statement. *See* Respondent's Brief in Opposition to the Petition for a Writ of Certiorari, p. 1, n. 1. Dr. Friedman's trial testimony does not constitute a disavowal as claimed by respondent, since Dr. Friedman merely said that he didn't recall Ewing saying that a single failure *would* result in his dismissal. J.A. 81. The testimony of both Dr. Friedman and Ewing himself as to what Ewing believed *would* happen in no way establishes what Ewing knew *could* happen.. J.A. 61, 81.

1982. J.A. 153-164. Each time he asked to be readmitted to the Medical School, and presented documentary and testimonial evidence to the committee members. The Executive Committee on each occasion, after deliberation, unanimously voted to affirm his dismissal. *Id.*

F. The Proceedings Below

On August 19, 1982, Ewing filed a four-count complaint in the United States District Court for the Eastern District of Michigan. The complaint sought equitable relief and damages in excess of one million dollars. His claim for damages was dismissed prior to trial as being barred by the Eleventh Amendment and was not appealed. Pet. App. at 4a. His equitable claim, as refined at trial, sought an order, first, placing him back in Medical School as an enrolled student and, second, permitting him a retest on the NBME Part I examination. J.A. 104. This claim was premised on three separate grounds: (1) violation under color of state law of Ewing's claimed right to substantive due process under 42 U.S.C. § 1983; (2) breach of contract; and (3) promissory estoppel. J.A. 13-16. A non-jury trial was held before Chief Judge John Feikens over four days in January 1983 and testimony was received from Ewing and eight of his professors.[7] The

[7] Other of his professors had been interviewed or subpoenaed by Ewing's attorney who decided not to call them as witnesses. In addition, the Medical School staff spent several weeks examining the records of hundreds of other students and extracting data requested by Ewing's attorney. J.A. 118. This data had never before been collected or compared by the Medical School. J.A. 36. See also Deposition of Senior Associate Dean Robert E. Reed, M.D. at pp. 15-18, 24 and 27; and Deposition of Professor of Neurosurgery and Associate Dean James A. Taren, M.D. at pp. 15-19, 26, and 78-79.

court denied each of Ewing's claims in its opinion filed on March 22, 1983. Pet. App. at 12a.

On appeal, the Sixth Circuit reversed the district court solely on the basis of Ewing's § 1983 claim. Pet. App. at 28a. It held that the Medical School, in denying Ewing a retest on the NBME, while "routinely" allowing retests to other students, had necessarily treated Ewing in an arbitrary and capricious manner in violation of his right to substantive due process. *Id.* at 32a. It ordered that he be permitted a retest and readmitted if he passed. *Id.* A timely petition for rehearing *en banc* was denied by the original hearing panel (Pet. App. 35a), even though the petition was accompanied by a previously missing portion of trial transcript (Supp. Tr.) which included the district court's finding that retests on the NBME were *not* "routine." J.A. 104.

SUMMARY OF ARGUMENT

Respondent Ewing is a California citizen who was dismissed from petitioner University of Michigan's Medical School for multiple academic deficiencies. Invoking 42 U.S.C. § 1983, he claimed that the school's refusal to grant him a retest on his last failed examination denied him substantive due process. The Sixth Circuit agreed. Petitioner argues that Ewing's claim is barred by the Eleventh Amendment and is unprotected by the Fourteenth Amendment.

The Eleventh Amendment bars a citizen of one state from bringing suit in the federal courts against another state for damages or equitable relief, particularly where the suit seeks to enforce disputed state

rules, customs or practices. *Pennhurst State School and Hospital* v. *Halderman,* —— U.S. ——, 104 S.Ct. 900 (1984).

A medical student's interest in repeating an examination given by a state university medical school is not entitled to substantive protection under the Due Process Clause of the Fourteenth Amendment. Substantive review of a faculty's decision to dismiss a student for academic reasons would intrude on the university's right to determine academic policy and evaluate student scholarship. Accordingly, federal courts should not entertain 42 U.S.C. § 1983 actions to set aside academic decisions of state medical schools on substantive grounds. Where those decisions are conceded to be procedurally correct, as in this case, the decisions must be presumed to be substantively correct as well.

The Sixth Circuit conducted an impermissible *de novo* review of the University of Michigan Medical School's dismissal of Ewing. It ignored the district court's finding that he was dismissed on the basis of his entire academic record, and not solely because he failed the examination. In ordering the Medical School to allow Ewing a re-examination, and in further ordering that he be reinstated in the school if he passes the examination, the Sixth Circuit fashioned relief beyond that which could have been ordered by Michigan state courts had they considered this case.

Medical school education is largely dependent upon the unstinting dedication of skilled medical educators. Judicial review and reversal of academic decisions has a chilling effect on all institutions of higher education and is not wise policy.

ARGUMENT

I. THE SIXTH CIRCUIT'S INJUNCTIVE ORDER IS AGAINST THE STATE OF MICHIGAN ITSELF, IS BARRED BY THE ELEVENTH AMENDMENT, AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL AND HOSPITAL* v. *HALDERMAN*

A. Respondent Ewing's Claim Is Against The State Of Michigan And Petitioner Timely Interposed The Bar Of The Eleventh Amendment As An Affirmative Defense And Did Not Waive Its Eleventh Amendment Immunity.

The University of Michigan, known as the Regents of the University of Michigan under the Michigan Constitution[8] is recognized by the highest court of that state as a fourth branch of state government.[9] In both his original and amended complaint, respondent named petitioner "Board of Regents of the University of Michigan" as the only defendant, sought relief against the Board as an entity, and did not name or seek relief against the individual Regents as defendants. J.A. 13. Petitioner raised the bar of the Eleventh Amendment as an affirmative defense (J.A. 23) and, on motion, the district court dismissed respondent's damage claim, holding on the basis of settled law that petitioner was "a state instrumentality within the meaning of the Eleventh Amendment." Pet. App. at 8a.

[8] "The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan * * *." Michigan Constitution, Art. 8, § 5.

[9] *Regents of the University of Michigan* v. *State*, 395 Mich. 52, 74, 235 N.W.2d 1, 11 (1975); *Regents of the University of Michigan* v. *Michigan Employment Relations Commission*, 389 Mich. 96, 108, 204 N.W.2d 218, 223 (1973); *Board of Regents of the University of Michigan* v. *Auditor General*, 167 Mich. 444, 450, 132 N.W. 1037, 1040 (1911); and *Sterling* v. *Regents of the University of Michigan*, 110 Mich. 369, 377-378, 68 N.W. 253, 255-256 (1896).

Respondent contends that petitioner has waived any right to assert the Eleventh Amendment as a defense to respondent's claim for equitable relief. *See* Respondent's Brief In Opposition to the Petition for Certiorari, at pp. 11-13. Respondent bottoms his argument on various statements made in petitioner's district court briefs as to the type of relief which that court might have been able to fashion should respondent have prevailed (J.A. 5-6, 11-12), and on petitioner's failure to argue the Eleventh Amendment before the Sixth Circuit. J.A. 25-26.

Respondent's waiver argument ignores the history of these proceedings. The district court, in dismissing respondent's damage claim, specifically ruled that there had been no waiver of the Eleventh Amendment. Pet. App. at 4a-11a. Ewing did not appeal that decision and thereby conceded the correctness of the district court's ruling that the University of Michigan was entitled to Eleventh Amendment immunity. If the Eleventh Amendment affords immunity to the University of Michigan it does so no matter how far that immunity extends. This Court's later decision in *Pennhurst State School and Hospital* v. *Halderman*, —— U.S. ——, 104 S.Ct. 900, 909 (1984), made it clear that the scope of the Eleventh Amendment extends to claims for equitable relief. Moreover, the Eleventh Amendment defense had been raised as to respondent's entire complaint, including Ewing's claims for equitable relief. J.A. 23.

It was not necessary for petitioners to move to dismiss respondent's equitable claims in the district

court in order to preserve the Eleventh Amendment defense. *Edelman* v. *Jordan,* 415 U.S. 662, 676-678 *reh. den.* 416 U.S. 1000 (1974); *Pennhurst State School and Hospital* v. *Halderman,* —— U.S. ——, 104 S.Ct. 900, 907, n. 8 (1984); and *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U.S. 459 (1945). The Sixth Circuit so held as to the University of Michigan. *MacDonald* v. *Board of Regents of the University of Michigan,* 371 F.2d 818 (6th Cir. 1967).

B. The Eleventh Amendment Bars Both Legal and Equitable Relief In This Case.

The Eleventh Amendment prohibits the federal judiciary from exercising any equitable powers in this suit brought by a California citizen against the State of Michigan. "[W]hen the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst State School and Hospital* v. *Halderman,* —— U.S. ——, 104 S.Ct. 900, 909 (1984).

The members of the governing Board of Regents of the University of Michigan, whether acting individually or officially as a group, would not think of determining for the faculty of the Medical School what subjects to teach or what individual student to admit, pass, or fail. Moreover, the Regents cannot be ordered by the federal courts in this case to grant *any* relief to the California respondent at bar because "the State is the real substantial party in interest * * *." *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U.S. 459, 464 (1945). *See also Cory* v. *White,* 457 U.S. 85 (1982). The narrow exception of *Ex Parte Young,* 209 U.S. 123 (1908), does not apply because respondent's action was brought against "a body corporate" and not against individual state officials. *Edelman* v. *Jordan,* 415 U.S. 651, *reh. den.* 416 U.S. 1000 (1974). Accord *Quern* v. *Jordan,* 440 U.S. 332 (1979); *Alabama* v. *Pugh,* 438 U.S. 781 (1978); and *Hall* v. *Medical College of Ohio at Toledo,* 741 F.2d 299 (6th Cir. 1984).

C. The Lower Court's Injunction Illustrates The Timeless Purpose Of The Eleventh Amendment.

In *Pennhurst,* this Court observed that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 104 S.Ct. at 911. In harkening to respondent's talismanic recitation of a "second chance" rule, and in not questioning respondent's seductively misleading statistics, the Sixth Circuit has brought into sharp focus the reason for this Court's emphasis in *Pennhurst.* By implicitly reserving matters of education to the several states, our Constitution has permitted medical school education in this country to flourish with the development of large medical centers of premier excellence. Even the Supreme Court of Michigan, in opinions which have withstood the test of time, has refused to interfere with the faculty of the Medical School in establishing its curriculum, in selecting its faculty and students, and in passing upon the qualifications of its students.[10]

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[10] *People Ex Rel. Drake* v. *Regents of the University of Michigan,* 4 Mich. 98 (1856) (mandamus to appoint homeopathic professor denied); *People* v. *Regents of the University,* 18 Mich. 469 (1869) (state statute requiring appointment of professor of homeopathy unconstitutional); and *Attorney General* v. *Regents of the Univer-*

More than law school,[11] medical school education is designed to rigorously train students to perform decisively and correctly and to make rapid life-saving decisions, even in a crisis atmosphere. For this reason, the courses and tests during the curriculum are so arranged and structured as to train medical students for later patient care. Thus, the comprehensive NBME Part I examination is administered by the Medical School immediately after the basic phase but before the clinical science phase of a student's education in order to timely test the student's fund of knowledge essential to treat human illnesses. In 1981 a score of 345 was required for promotion to the clinical phase. Respondent earned a score of 235, which the district court found to be the lowest score ever recorded in the history of the Medical School. Pet. App. at 15a.

Only the most sanguine educator would expect respondent to pass the examination a second time if he were required to take it under normal conditions, in the midst of a stressful curriculum, competing against fellow students. J.A. 72. Yet the Sixth Circuit's order allows respondent to take the examination after studying for it at his leisure, on his own terms, and on his own time,[12] thus defeating an essential purpose of test-

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sity, 30 Mich. 472 (1874) (application to require appointment of two professors of homeopathy declined).

[11] On this point see especially *People* v. *Phippen*, 70 Mich. 6, 19-20, 37 N.W. 888, 895 (1888).

[12] The district court's final judgment of December 4, 1984, was entered pursuant to the Sixth Circuit's order and was drafted by counsel for respondent. Pet. App. at 1a-3a. It shows that respondent has selected September of 1986 as the date for his second sitting of the NBME Part I examination, thus giving him some five years after his failure of the examination to prepare for a retest, whereas his former classmates had just a few days to prepare for such examination. Furthermore, the final judgment states that respondent is to be graded under 1981 standards (passing score of 345), even though the Medical School's present passing score is 380 for all students.

ing in the Medical School curriculum.[13]

D. Respondent's Complaint Could Have Been Handled Competently By The Michigan State Courts.

The Sixth Circuit's order constitutes grading by demoralizing injunction and demonstrates in two other ways why federal courts should not venture into state academic thickets. First, it exceeds even what Michigan's state courts could have ordered had respondent brought this action in those courts. *Maitland* v. *Wayne State University*, 76 Mich. App. 631, 639-640, 257 N.W.2d 195, 200 (1977) (state courts cannot order reinstatement, only rehearing at university level). *See Dietz* v. *American Dental Association*, 479 F.Supp. 554 (E.D. Mich. 1979). Second, it orders petitioner to perform an academically impossible task since only students who are officially enrolled in United States or Canadian medical schools may sit for the NBME Part I examination.[14]

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[13] The opening essay of a leading textbook on medicine teaches that "the practice of medicine cannot be sealed off into convenient hours * * *." R. Cecil, *Textbook of Medicine* at xxxvi (J. Wyngaarden & L. Smith, 16th ed. 1982).

[14] The National Board of Medical Examiners is an independent entity located in Philadelphia and is not a party to this action. As appears from the annual NBME Official Bulletins, a student not officially enrolled in or graduated from a United States or Canadian accredited medical school is not eligible for administration of any NBME examination. See, for example, PX 4.

There is no reason why § 1983 claims like respondent's should not be brought in state courts. *Bonner* v. *Circuit Court of the City of St. Louis,* 526 F.2d 1331 (8th Cir. 1975), *cert. den.* 424 U.S. 946, *reh. den.* 425 U.S. 926 (1976).

State courts time and again have demonstrated their competence to handle cases very similar to the case at bar. *Tanner* v. *Board of Trustees of the University of Illinois,* 121 Ill. App. 3d 139, 459 N.E.2d 324 (1984); *Neel* v. *Indiana University,* 435 N.E.2d 607 (Ind. App. 1982); *In re Levy,* 88 A.D. 915, 450 N.Y.S.2d 574 (1982); *McIntosch* v. *Borough of Manhattan Community College,* 55 N.Y.2d 913, 433 N.E.2d 1274 (1982); *Essigman* v. *Western New England College,* 419 N.E. 2d 1047 (Mass. App. 1981); *Sofair* v. *State University of New York,* 44 N.Y.2d 475, 377 N.E.2d 730 (1978); *Maitland* v. *Wayne State University,* 76 Mich. App. 631, 257 N.W.2d 195 (1977); *Frank* v. *Marquette University,* 209 Wis. 372, 245 N.W. 125 (1932); and *Barnard* v. *Inhabitants of Shelburne,* 216 Mass. 19, 102 N.E. 1095 (1913).

II. FEDERAL COURTS SHOULD NOT SUBSTANTIVELY REVIEW AND REVERSE THE ACADEMIC DECISIONS OF PROFESSIONAL EDUCATORS UNDER 42 U.S.C. § 1983

A. The Sixth Circuit's Order Is An Unwarranted Intrusion Into Academic Decisionmaking.

The lower court's order is a dangerous precedent that seriously threatens all medical school education in this country. Indeed, it has sounded a shock wave throughout the community of medical schools in the United States and has dispirited Ewing's former professors, at least one of whom devoted more than a hundred hours in reviewing his academic record and hearing his appeals. J.A. 78. If allowed to stand, and if followed by other courts in other jurisdictions, it could lead medical school faculties to abandon carefully developed and longstanding evaluation processes in favor of inflexibly applied standards which could signal the end of high-quality medical school education in this country.

Such drastic transformation of the educational process would not enhance its fairness, but would deprive countless students of the extra assistance and encouragement presently afforded them through the flexibility inherent in an individualized evaluation system. As this Court cautioned in *Board of Curators of the University of Missouri* v. *Horowitz,* 435 U.S. 78 (1978), "any such intrusion into academic decisionmaking" therefore must be carefully avoided. *Id.* at 92.

B. Judicial Deference To Academic Decisions Has Long Been Recognized.

Repeatedly this Court has emphasized the special nature of academic decisionmaking and the federal judiciary's traditional reluctance to interfere in that process.[15] Such reluctance is particularly appropriate at the college, graduate and professional school level, where the relationship between students and faculty is

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[15] *Board of Education of the Hendrick Hudson Central School District* v. *Rowley,* 458 U.S. 176, 208 (1982); *University of California Regents* v. *Bakke,* 438 U.S. 265, 312 (1978); *Board of Curators of the University of Missouri* v. *Horowitz,* 435 U.S. 78, 90-92 (1978); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 42 (1973); *Tinker* v. *Des Moines School District,* 393 U.S. 503, 507 (1969); *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968); and *Sweezy* v. *New Hampshire,* 354 U.S. 234, 261-263 (1957) (Frankfurter, J., concurring).

a purely voluntary undertaking. In this setting, "[i]t is the business of the university to provide that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy* v. *New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

The trial court analyzed at some length why federal courts ought not examine the substance of academic decisions. As Chief Judge Feikens aptly concluded, "it is for prudential as well as pragmatic reasons that the propriety of [such] decisions cannot be reviewed." Pet. App. at 26a. In reversing, however, the Sixth Circuit failed to acknowledge even a single restriction on its authority to address the petitioner's decision to dismiss Ewing for failure to meet the Medical School's academic standards.

1. Academic freedom rests on the ability of professional educators to exercise good faith discretion.

Judicial reluctance to intrude upon the academy stems primarily from our national dedication to safeguarding academic freedom. *See Healy* v. *James,* 408 U.S. 169, 180-181 (1972); *Keyishian* v. *Board of Regents of New York,* 385 U.S. 589, 603 (1967); and *Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957). In *Sweezy,* Chief Justice Warren stressed the importance of academic freedom on college campuses:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. [*Id.* at 250.]

Central to encouraging academic freedom is the principle that educators, being in the best position to do so, must be left free to make their own decisions. *See Doe* v. *New York University,* 666 F.2d 776 (2d Cir. 1981). *Mahavongsanan* v. *Hall,* 529 F.2d 448 (5th Cir. 1976); and *Jansen* v. *Emory University,* 440 F. Supp. 1060 (N.D. Ga. 1977). Courts, laboring under heavy dockets, are ill-equipped to make sensitive academic decisions which require the "expert evaluation of cumulative information." *Board of Curators* v. *Horowitz,* 435 U.S. at 90.

In addressing the substantive due process rights under 42 U.S.C. § 1983 of persons involuntarily committed to a state mental institution, this Court recently explained the approach the federal judiciary should take toward decisions made by professionals. *Youngberg* v. *Romeo,* 457 U.S. 307 (1982). Ruling that the decisions of professionals are presumptively valid, the Court wrote:

> In determining what is "reasonable" * * * we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges [to professional judgment] * * * interference by the federal judiciary with the internal operations of these institutions should be minimized. Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. * * * For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. [*Id.* at 322-323.]

Petitioner's medical faculty based its professional decision to dismiss Ewing upon his record as a whole, and upon "grave doubts" of Ewing's "ability to assume responsibility as a physician" (J.A. 164), and not just upon his failure of the NBME. J.A. 57. Even when the medical faculty had allowed a retest to other students who failed the first administration of the NBME, it always reviewed, deliberated and voted on each student's entire record (J.A. 129-132), and this process was not a mere "routine." J.A. 104.

Under these circumstances, the medical faculty's decision to dismiss Ewing is entitled to a presumption of validity, since it was based on a collective, professional judgment that he was unqualified to continue in his studies. The mere fact that the faculty reached different conclusions as to other students can not mean that the faculty's decision in Ewing's case was based on anything other than professional judgment, practice or standards.

It is particularly appropriate to presume the validity of the medical faculty's judgment here, since it intimately concerns whether Ewing himself should be allowed the opportunity to become a medical professional. Virtually every one of Ewing's professors who was subpoenaed as a witness testified that Ewing was not competent to continue in the Medical School and should not be allowed to go on to become licensed as an M.D.[16]

[16] The only professor to testify that Ewing should have been given a second chance was Pharmacology Professor Bert N. La Du, M.D., Ph.D., who conceded that he knew more about the standard program than the Inteflex program and therefore admitted that he could not speak as a member of the Inteflex Promotion and Review Board (Tr. III at 198, 201), testified that the Promotion Board would have had more information concerning Ewing than individual faculty members, including La Du (*Id.* at 194), that he had

Professor of Biological Chemistry K. M. Jairam Menon, Ph.D., testified that Ewing thought "the world owed him a living" and that he should not be allowed to continue in the program "[b]ecause he doesn't seem to know that much of the basic sciences on the basis of" his NBME Part I scores. J.A. 70. Professor of Human Genetics Henry Gershowitz, Ph.D., who spent six to eight hours as a member of the Promotion and Review Board in consideration of Ewing's case (J.A. 72), testified that Ewing was "certainly doomed to failure" and thin in view of his "very abysmally poor record * * * there was just no point in continuing this." J.A. 72-73.

Finally, Professor of Pathology Bruce A. Friedman, M.D., who testified that he served on many due process committees within the university, and who is well known as an advocate of student rights, testified that he was "absolutely certain [Ewing] should be dropped from registration, [and] not be allowed to continue." J.A. 78. When asked to explain why he was so certain, Professor Friedman testified that Ewing's failure of the NBME Part I examination was "one of many deficiencies * * * [and] the straw that broke the camel's back. It's absolutely an abysmal performance; in my opinion, unremedial." J.A. 79. Dr. Friedman concluded by asserting that Ewing's manner of approaching problems "would be a damaging kind of way to treat patients." *Id.*

Most people who enter medicine or academic life are attracted to the profession by their desire to help people. The entire Medical School faculty, no less than

"no reason to question that a fair hearing was had" (*Id.* at 195), and that the members of the committee were concerned and conscientious and indeed anguished over their decisions of dismissal. *Id.* at 197.

those of its members who were quoted above and who gave selflessly of their time and talents only to be searchingly cross-examined both on deposition and at trial, do not fathom the basis for what they perceive to be a cavalier reversal of their unanimous decision, and may not be as willing to shoulder the burden of committee appointments within the Medical School in the future.

Faculty members quite often feel a sense of failure when they are unable to help a student who performs deficiently. As a result, they may find themselves helping a student beyond any extent which is reasonable in an effort to lessen the internal conflicts of personal values and expectations which they hold for the student.[17] Where the deficient student is gratuitously furnished an abundance of help, beyond what any student or faculty member should expect, judicial reversal of the final, carefully considered decision to dismiss him is not only wrong, it is destructive.

2. Federal intrusion into a domain historically the province of state authorities undermines historic principles of federalism.

Under the Tenth Amendment any review of rules promulgated by a state governmental unit must take into account the framers' concept of the proper relationship between the state and federal governments. Historically public education has been committed to the control of state and local authorities. *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968). *See also Board of*

[17] Irby, Fantel, Milam and Schwartz, *Faculty Rights and Responsibilities in Evaluating and Dismissing Medical Students,* J. Coll. & Univ. Law 102, 116-117 (Spring 1981).

Education of the Hendrick Hudson Central School District v. *Rowley,* 458 U.S. 176, 207-208, n. 30 (1982).

In the permissible exercise of their broad discretionary powers, state and local authorities have developed a complex framework of written and unwritten rules and policies to govern the diverse elements which comprise their educational systems. Maintenance of principles of federalism is especially compelling in the academic arena because of the broad impact of federal intrusion. As this Court stated in refusing to condemn a concededly imperfect financing system adopted by a Texas school district, "it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every state." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 44 (1973). Similarly, federal supervision of the academic review and evaluation system employed by petitioner's Medical School, as well as by nearly every other post-secondary educational authority across the country, would seriously undermine the proper balance of our federal system.

3. The costs of federal oversight of academic decisions outweigh any short term benefits.

Involvement of the federal courts in questions of academic qualification, in addition to complicating an already difficult decisionmaking process, would also impose substantial costs on academic institutions and on society in general. Lawsuits brought by aggrieved students would expand an already heavy federal caseload. Courts necessarily would become involved in "inspection and review" of examinations, and trials "would

require the opinion testimony of experts and submerge the court in the testing and grading process." *Lavash* v. *Kountze,* 604 F.2d 103, 106 (1st Cir. 1979) (challenge of Massachusetts procedures respecting civil service examinations). Such a result "would impose fiscal and administrative burdens out of all proportion to the ends sought." *Id.* Increasingly severe education funding problems then would be aggravated as limited funds would be diverted to finance growing litigation costs.

Extracautionary objective measures, adopted by institutions to avoid disruptive litigation, could diminish their faculties' ability to give individualized attention to marginal students, and would militate against the admission of high risk students from educationally disadvantaged backgrounds. Faculty members, such as those involved in the present case, might well choose to forego academic life altogether.

Finally, the value of degrees conferred on other students would be diluted, as federal courts would essentially have the power to award degrees to students who, in the institution's judgment, are academically unqualified. *See, e.g., Bleicker* v. *Board of Trustees of Ohio State University,* 485 F. Supp. 1381, 1389 (S.D. Ohio 1980) (additional tuition to be gained by readmitting student would be outweighed by the loss of the University's integrity and reputation of its degrees).

On the other side, any benefits which might result from judicial supervision of academic decisionmaking are slight. Time spent by faculty in considering and evaluating students on an individual basis would be greatly reduced by the application of objective standards, and faculty would therefore be able to devote more of their time to research and other academic

pursuits. Through application of wooden standards, every student would know exactly how many opportunities he or she and every other student would have in order to overcome any academic weaknesses, and extenuating circumstances would not be taken into account.

The result of balancing the costs and the benefits of any judicial intervention into academic decisionmaking is clear. The federal judiciary must defer to the decisionmaking expertise of professional educators.

C. Failure To Give A Student Remedial Opportunities Offered Other Students Does Not By Itself Amount To An Arbitrary And Capricious Denial Of Substantive Due Process.

1. Where a medical faculty's decision to dismiss an academically deficient student has been carefully and deliberately considered, its substance necessarily must be presumed correct.

In *Board of Curators* v. *Horowitz,* 435 U.S. 78 (1978), this Court considered those procedures which a state university medical school should follow before dismissing an academically deficient student. *Horowitz* requires a medical school to give a student notice of his or her deficiencies, but does not require the school to conduct a hearing at which the student may personally appear. *Id.* at 85-86. The Court found that the University of Missouri reached a "careful and deliberate" decision to dismiss Charlotte Horowitz. *Id.* at 85.

Significantly, Ewing (unlike Charlotte Horowitz) has never challenged the procedures followed by petitioner's Medical School in dismissing him for failure to meet its academic standards. J.A. 16, 85-86. Indeed, petitioner's medical faculty extended him more than ample opportunity to vindicate his academic failure.

Ewing was clearly notified on numerous occasions of the faculty's dissatisfaction with his progress and the danger that this posed to his continued enrollment. J.A. 143-146. He was also given several opportunities to present his position to the faculty, and he submitted a number of letters, DX 21, 22, 23, 24, 27, 31, 33 and 34, as well as copies of articles he had written, details of honors and awards he had received, and letters of reference written on his behalf by others. DX 11, 12, 13 and 44. In addition, although not required under *Horowitz,* the faculty gave Ewing four opportunities to present his position in person. He appeared once before the Inteflex Promotion and Review Board (J.A. 134), and three times before the Medical School's Executive Committee, J.A. 147-164.[18]

Ewing's claim for violation of his substantive due process rights therefore can be distinguished from virtually every other case in which the federal courts have considered the propriety of student academic dismissals. In most of these cases, *both* the substantive and procedural sufficiency of the dismissal decision were at issue.[19] It is enough to satisfy the due process

[18] One faculty member testified that he spent more time reviewing Ewing's record and considering his appeals than he spent on any other student. J.A. 78.

[19] *See Stoller* v. *College of Medicine,* 562 F.Supp. 403 (M.D. Pa. 1983), *aff'd* 727 F.2d 1101 (3d Cir. 1984); *Greenhill* v. *Bailey,* 519 F.2d 5 (8th Cir. 1975); *Gaspar* v. *Bruton,* 513 F.2d 843 (10th Cir. 1975); *Hubbard* v. *John Tyler Community College,* 455 F. Supp. 753 (E.D. Va. 1978); *Aubuchon* v. *Olsen,* 467 F.Supp. 568 (E.D. Mo. 1979); and *Watson* v. *University of South Alabama College of Medicine,* 463 F.Supp. 720 (S.D. Ala. 1979). *But see Hines* v. *Rinker,* 667 F.2d 699 (8th Cir. 1981) (no allegation of procedural due process violation); and *Stevens* v. *Hunt,* 646 F.2d 1168 (6th Cir. 1981) (procedural due process violation originally

clause of the Fourteenth Amendment that procedures, however informal and non-adversarial, result in academic decisions which are "careful and deliberate." *Board of Curators* v. *Horowitz,* 435 U.S. at 85. *See Henson* v. *Honor Committee of University of Virginia,* 719 F.2d 69 (4th Cir. 1983) (academic deficiencies and cheating); *Stebbins* v. *Weaver,* 537 F.2d 939, 943 (7th Cir.) *cert. den.* 429 U.S. 1041 (1976) (faculty tenure); *Slaughter* v. *Brigham Young University,* 514 F.2d 622, 625 (10th Cir.), *cert. den.* 423 U.S. 898 (1975) (academic dishonesty); and *Anderson* v. *Banks,* 520 F.Supp. 472, 506 (S.D. Ga. 1981) (educational policy).

The decision below aside, one of the few and perhaps the leading post-*Horowitz* case in which a naked claim for substantive relief was alleged is *Hines* v. *Rinker,* 667 F.2d 699 (8th Cir. 1981). The medical student in *Hines* claimed that the school's failure to allow him to transform a failing grade into an incomplete and subsequently make up the deficiency, as purportedly provided by a written course outline, constituted arbitrary and capricious conduct in violation of his substantive due process rights. The student prosecuted nine costly appeals of his dismissal within the University before bringing his lawsuit, yet at each level his dismissal was affirmed. In the process, the entire medical school faculty reviewed his performance, both in the course he failed and as reflected by his overall academic record, which included a previous dismissal for academic reasons.

claimed but abandoned on appeal); and *McElearney* v. *University of Illinois,* 612 F.2d 285, 291 (7th Cir. 1979) (no due process claim presented).

The Eighth Circuit, without deciding whether the student had a cause of action under *Horowitz,* held under essentially the same standard employed by the Sixth Circuit, both in *Stevens* v. *Hunt,* 646 F.2d 1168, 1170 (6th Cir. 1981), and in the case at bar (Pet. App. at 32a), that there was no evidence of arbitrary and capricious action as a matter of law. Although the Eighth Circuit in *Hines* did not expressly premise its holding on the presence of precedural protections afforded the student by the University of South Dakota School of Medicine, it is clear that the court was impressed by the faculty's careful consideration of the student's circumstances. As is demonstrated by *Hines,* where a decision to dismiss is carefully and deliberately reached, substantive review is not warranted because any decision so reached, by definition, cannot be arbitrary and capricious.

Trial courts demonstrate no difficulty in reviewing academic procedures. It is when they pass on to review the academic substance of medical school decisions that the reported cases reflect a serious misplacement of judicial resources. *Watson* v. *University of South Alabama College of Medicine,* 463 F.Supp. 720 (S.D. Ala. 1979); and *Stoller* v. *College of Medicine,* 562 F.Supp. 403 (M.D. Pa. 1983).

By contrast, the Seventh Circuit has adopted a district court opinion which holds that if the plaintiff fails to present a case for violation of procedural due process, "it follows that no substantive due process claim has been stated either." *McElearney* v. *University of Illinois,* 612 F.2d 285, 291 (7th Cir. 1979). See also *Sanders* v. *Ajir,* 555 F.Supp. 240 (W.D. Wis. 1983); *Hall* v. *University of Minnesota,* 530 F.Supp. 104 (D. Minn. 1982); and *Ross* v. *Pennsylvania State University,* 445 F.Supp. 147, 154 (M.D. Pa. 1978).

Similarly, the Fourth Circuit refused to inquire into the academic reasons for the dismissal of a law student on grounds that such substantive review was prohibited under *Horowitz,* and strictly limited its review to the fairness of the procedures by which the dismissal was reached, *Henson* v. *Honor Committee of University of Virginia,* 719 F.2d 69 (4th Cir. 1983), observing:

> We cannot judge the reasons [the student] offers on appeal for these failures—that task belongs properly to the law school administrators. The limit of judicial inquiry into academic administration is early reached, and we need not even approach the limit to realize that, as unfortunate as his ultimate position may be, [the student] was fairly treated academically. [*Id.* at 72.]

In yet another law school dismissal case, the trial judge abstained from a substantive examination of the plaintiff's course grades at Texas Southern University School of Law, observing that "[i]t is difficult to imagine an area of academic life more suitable for judicial abstention." *Keys* v. *Sawyer,* 353 F.Supp. 936, 939 (S.D. Tex. 1973).

It cannot be gainsaid that if judges are to refrain from reviewing the substance of academic decisions made by law schools, they should exercise even more restraint when called upon to review academic decisions made by medical schools.

2. The standard of review adopted by the Sixth Circuit, if not inappropriate entirely, was incorrectly applied

In *Board of Curators* v. *Horowitz* this Court did not directly settle the issue whether substantive review of decisions by professional educators to dismiss a

student for academic deficiency is permissible. 435 U.S. at 91-92. Nonetheless, a number of courts, including the Sixth Circuit, have relied on *Horowitz* as support for the view that such a claim consists of three separate elements. Although disagreeing in their understanding of *Horowitz,* these courts generally require that the student be deprived of a protected liberty or property interest under color of state law in an arbitrary or capricious manner.[20] Other courts have avoided detailing the elements of the alleged claim by finding that no showing of arbitrariness or capriciousness had been made.[21] This claimed substantive due process cause of action plainly has been troublesome to the lower courts.

In addressing the procedural due process claim in *Horowitz,* this Court only assumed for purposes of analysis the existence of a protectible liberty or property interest in pursing a medical career. 435 U.S. at 84-85. Some lower courts considering substantive due process claims have done likewise. *St. Louis Developmental Disabilities Treatment Center* v. *Mallory,* 591

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[20] *Stevens* v. *Hunt,* 646 F.2d 1168 (6th Cir. 1981); *Williams* v. *Howard University,* 528 F.2d 658 (D.C. Cir.), *cert. den.* 429 U.S. 850 (1976); *Gaspar* v. *Bruton,* 513 F.2d 843 (10th Cir. 1975); and *Stoller* v. *College of Medicine,* 562 F.Supp. 403 (M.D. Pa. 1983), *aff'd,* 727 F.2d 1101 (3rd Cir. 1984). *See also St. Louis Developmental Disabilities Treatment Center Parents Ass'n.* v. *Mallory,* 591 F.Supp. 1416 (W.D. Mo. 1984).

[21] *Hines* v. *Rinker,* 667 F.2d 699 (8th Cir. 1981); *Watson* v. *University of South Alabama College of Medicine,* 463 F. Supp. 720 (S.D. Ala. 1979); *Aubuchon* v. *Olsen,* 467 F.Supp. 568 (E.D. Mo. 1979). *Cf. Hubbard* v. *John Tyler Community College,* 455 F.Supp. 753 (E.D. Va. 1978) (court refused to consider plaintiff's substantive due process claim, but noted that no arbitrary and capricious conduct existed).

F.Supp 1416, 1475 (W.D. Mo. 1984) (Hunter, J.). Some courts, including the Sixth Circuit in the case at bar, have held that a student possesses a constitutionally protectible property interest in an education. Pet. App. at 31a. See also *Stevens* v. *Hunt,* 646 F.2d 1168, 1169-1170 (6th Cir. 1981); *Gaspar* v. *Bruton,* 513 F.2d 843, 850 (10th Cir. 1979); and *Stoller* v. *College of Medicine,* 562 F.Supp. 403, 412 (M.D. Pa. 1983). Yet Ewing alleged only the lesser interest in continued enrollment. J.A. 15-16.

Property interests are creatures entirely of state law. *Board of Curators* v. *Horowitz,* 435 U.S. at 82; *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972); *Perry* v. *Sindermann,* 408 U.S. 593, 599-603 (1972). They may arise from express or implied contractual provisions or other existing rules or understandings. *Id.* at 601-602.

Michigan law is clear that an individual does not possess a property right in the practice of a particular business or profession. *People* v. *Phippen,* 70 Mich. 6, 37 N.W. 888 (1888) (medicine and law); *Falk* v. *State Bar of Michigan,* 411 Mich. 63, 128, 305 N.W.2d 201, 223 (1981) (law); *Nelles* v. *Superintendent of Public Instruction,* 5 Mich. App. 47, 51, 145 N.W.2d 795, 797 (1966), *lv. app. den.* 378 Mich. 748, *cert. den.* 389 U.S. 9 (1967) (psychology). Nor does Michigan regard education itself as a fundamental right under Michigan's Constitution of 1963. *East Jackson Public Schools* v. *Michigan,* 133 Mich. App. 132, 137, 378 N.W.2d 303, 305 (1984), construing *Governor* v. *State Treasurer,* 390 Mich. 389, 212 N.W.2d 711 (1973). See also *Sutton* v. *Cadillac Area Public Schools,* 117 Mich. App. 38, 323 N.W.2d 582 (1982).

The Sixth Circuit, relying on *Perry* v. *Sindermann,* 408 U.S. 593 (1972), and on an old Michigan case, *Booker* v. *Grand Rapids Medical College,* 156 Mich. 95, 120 N.W. 589 (1909), held that Ewing possessed a contractual right, which rose to the level of a protectible property interest, in not being arbitrarily dismissed from the Medical School. Pet. App. at 30a-31a. According to the Sixth Circuit, this property interest also embraced the right to a second chance on the NBME Part I, although the court never expressly addressed this point. It did, however, reverse as "clearly erroneous" the trial court's factual finding that the university had not bound itself either expressly or by a course of conduct to give Ewing a second chance to take the NBME Part I, despite undisputed testimony that students were only allowed a retest by independent and separate action of the faculty boards. J.A. 30, 129-132; Pet. App. at 32a-33a.

The Sixth Circuit panel in the case at bar further ignored a significantly relevant decision rendered by another panel of the same court which found, under comparable Tennessee law, that a medical student had no property right in a retest on the NBME examination. *Stevens* v. *Hunt,* 646 F.2d 1168, 1170 (6th Cir. 1981). It also failed to recognize that the possibility of academic failure is implicit in the relationship between a student and a university, whether that relationship is characterized as contractual or otherwise, *Marquez* v. *University of Washington,* 648 P.2d 94, 97 (Wash. App. 1982). It also erred in seeking to bolster its contract finding by referring, not to the Medical School's official catalogs (DX 32-40), but to a promotional magazine (J.A. 113) which referred to qualified standard students and not unqualified stand-

ard or Inteflex students (J.A. 82), and which was known by Ewing to be inapplicable to him. J.A. 60.

In *Jansen* v. *Emory University,* 440 F.Supp. 1060 (N.D. Ga. 1977), where the court rejected a similar claim based on one sentence in a college bulletin, Judge Moye wrote:

> Over these bare bones the plaintiff attempts to drape the entire panoply of due process rights developed by the Supreme Court in cases such as *Board of Regents* v. *Roth,* 408 U.S. 564 (1971), and *Goss* v. *Lopez,* 410 U.S. 565 (1975). * * * The underlying assumption [of plaintiff as to the meaning of the language in the college bulletin] is extravagant. [*Id.* at 1062.]

The Sixth Circuit's analysis of Ewing's alleged property right is therefore flawed.

The lower courts have been especially troubled by the interpretation and application of the arbitrary and capricious component of a claimed substantive due process cause of action, and have been unable to reach a consensus. Some courts have found, without defining the requirement, that no such conduct could be established on the facts presented. *Bleicker* v. *Board of Trustees of Ohio State University,* 485 F. Supp. 1381, 1387 (S.D. Ohio 1980). Other courts, cited with approval in *Horowitz,* only considered whether the university officials had acted in bad faith. *Gaspar* v. *Bruton,* 513 F.2d 843, 850 (10th Cir. 1975), and *Barnard* v. *Inhabitants of Shelburne,* 216 Mass. 19, 102 N.E. 1095 (1913). *See also Depperman* v. *University of Kentucky,* 371 F.Supp. 73, 76 (E.D. Ky. 1974). Still other courts, including the Sixth Circuit, have held that if the decision was made in bad faith or is

without rational basis the requirement is satisfied. Pet. App. at 32a; *Stevens* v. *Hunt,* 646 F.2d 1168, 1170 (6th Cir. 1981); *Hines* v. *Rinker,* 667 F.2d 699, 703 (8th Cir. 1981); and *Stoller* v. *College of Medicine,* 562 F.Supp. 403, 412 (M.D. Pa. 1983). One court has stated that the showing can be made only where another student with an academic record and an individual history very similar to the plaintiff's was afforded substantially different treatment. *Watson* v. *University of South Alabama College of Medicine,* 463 F.Supp. 720, 727 (S.D. Ala. 1978). A number of slightly differing formulations of the requirement have also been adopted.[22] However, regardless of the precise standard adopted, it is generally agreed that the aggrieved student must present clear evidence that the requirement of arbitrary and capricious action has been satisfied. *Gaspar* v. *Bruton,* 513 F.2d 843, 850 (10th Cir. 1975).

Given the disagreement among the lower courts as to how "arbitrary and capricious" action may be demonstrated, it is certainly clear that the standard

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[22] *Williams* v. *Howard University,* 528 F.2d 658 (D.C. Cir.) *cert. den.* 429 U.S. 850 (1976) (improper motivation or irrational action); *Aubuchon* v. *Olsen,* 567 F.Supp. 568, 752 (E.D. Mo. 1979) (bad faith or arbitrary action); *Connelly* v. *University of Vermont,* 244 F.Supp. 156, 161 (D. Vt. 1965) (dismissal is for reasons other than the quality of the student's work or was in bad faith). *Compare Dunlop* v. *Bachowski,* 421 U.S. 560, 572-573 (1975) (federal courts may only review whether statement of reasons, without more, given by Secretary of Labor to justify refusal to institute action on behalf of private complainant under §401 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 481), is so irrational as to render the decision arbitrary and capricious).

adopted by the Sixth Circuit is not appropriate. Indeed, just after *Horowitz* was decided, this Court held that the due process protection of 42 U.S.C. § 1983 did not extend to a state's personnel decisions absent any motivation to curtail or penalize the exercise of an employee's constitutionally protected right. *Bishop* v. *Wood,* 426 U.S. 341, 350 (1976).

Assuming the appropriateness of *Bishop,* the Sixth Circuit's application of the arbitrary and capricious standard to the facts of this case is startling. Since the Sixth Circuit did not disturb the trial court's finding that the petitioner's decision to dismiss Ewing was not motivated by "bad faith, ill will, or other impermissible ulterior motives" (Pet. App. at 26a), it was inferentially applying the no rational basis test. Yet the court premised its holding on a single fact—Ewing's denial of a retest. It never expressly concluded that the existence of that sole fact demonstrated that there was no rational basis for the faculty's decision nor, indeed, could it have. The egregious nature of Ewing's academic record as a whole, never once addressed by the Sixth Circuit, convincingly establishes that the faculty "had good reason to dismiss Ewing from the program." Pet. App. at 26a.

3. Civil Rights legislation was never intended and should not be used to give the federal courts jurisdiction over traditional state law contract claims.

The Sixth Circuit found an implied contract in a disputed state rule purportedly allowing Ewing a retest. Pet. App. 32a-33a. To do so, it reversed the trial court's factual finding that no such rule existed. *Id.* In further stating that the petitioner's mere failure to comply with this disputed rule (in which it found

Ewing to have a protectible property interest) necessarily constituted arbitrary and capricious state action, the Sixth Circuit essentially has transformed a garden variety state contract action into a federally protectible right under 42 U.S.C. § 1983.

The Sixth Circuit's decision, astonishing in its naive view of higher education, assumes that the University's single failure to follow its own "rule" amounts to a constitutional violation. Yet, in *Horowitz* this Court implied the very opposite was true. 435 U.S. at 92, n. 8. See also *Bauza* v. *Morales Carrion,* 578 F.2d 447, 451 (1st Cir. 1978), *Hill* v. *Trustees of Indiana University,* 537 F.2d 248, 252 (7th Cir. 1976); *Mahavongsanan* v. *Hall,* 529 F.2d 448, 450 (5th Cir. 1976); *Winnick* v. *Manning,* 460 F.2d 545, 550 (2d Cir. 1972); *Bates* v. *Sponberg,* 547 F.2d 325 (6th Cir. 1976); *Wilkenfield* v. *Powell,* 577 F.Supp. 579, 583 (W.D. Tex. 1983); *Jones* v. *Board of Governors of University of North Carolina,* 557 F.Supp. 263, 265-270 (W.D. N.C.), *aff'd,* 704 F.2d 713 (4th Cir. 1983); and *Edwards* v. *Board of Regents of Northwest Missouri State University,* 397 F.Supp. 822, 830 (W.D. Mo. 1975).

The retest or "second chance" rule, which is the heart of the Sixth Circuit's analysis, was created by Ewing solely through statistical evidence. J.A. 107-112, 119-120. This court has cautioned, however, that "[n]o matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution." *Connecticut Board of Pardons* v. *Dumschat,* 452 U.S. 458, 465 (1981).

The reason for the cautionary logic of *Dumschat* respecting statistics is demonstrated in this case. Ewing's clever statistics combine the records of both Inteflex and standard students; but the Medical School faculty evaluates these two groups of students separately. J.A. 36; DX 35-40. Further, the statistics do not reflect the records of 19 Inteflex students who were dismissed from the petitioner's Medical School prior to receiving even a single opportunity to sit for the NBME Part I examination. J.A. 165-166. Nor do they reflect the fact that, among the eight Inteflex students who failed the NBME Part I on the first occasion, Ewing was only one of two who were on academic warning. The other student suffered an epileptic seizure during the examination, and because of such extenuating circumstances was naturally allowed a retest. (Deposition of Robert E. Reed, M.D., at 168-169.) Ewing, on the other hand, was unable to present any extenuating circumstances to explain his failing performance. Therefore, he was not "similarly situated" with 39 other students. Rather, he was the only Inteflex student to ever fail the NBME Part I examination while on academic warning and without extenuating circumstances. J.A. 35.

Even if Ewing's legal claim were correct, and the University's failure to follow its own rule formed the basis of a § 1983 claim for violation of substantive due process, he has failed to refute material facts on which the trial court relied in finding that no such rule was applicable to his particular situation. Pet. App. at 26a-27a. Since a district court's factual findings may not be set aside unless "clearly erroneous", *Pullman-Standard* v. *Swint,* 456 U.S. 273, 287 (1982), the Sixth Circuit reversal was improper.

D. Judicial Review Of The Substance Of Academic Decisions Is Not Wise Policy.

The exhibits and testimony received by the trial court illuminate a surfeit of safeguards designed by the Medical School to insure against erroneous academic decisions. They provide more than ample protection against the dismissal of a qualified student—even one who has invested time, energy and money in pursuit of a goal formulated perhaps in childhood.

Although Ewing did not accept the many invitations of the Dean's office to come in and discuss his problems (J.A. 144, 145, 146), he took advantage or had the benefit of nearly every safeguard afforded by the system. J.A. 76, 78. The Sixth Circuit ignored these factors in reversing the district court and in accepting Ewing's claim that he was denied substantive due process because he was the first student to be denied two chances at passing the NBME Part I examination. Ignoring Ewing's troubled academic record, the lower court failed to note that Ewing had failed many other examinations, some with the lowest grade in his class, was on academic warning when he sat for the NBME Part I examination, and that many other students were not allowed to sit for the examination even once. J.A. 165.

It is very easy to pass a student but very difficult to fail one.[23] Only professional medical educators can say at what point it becomes clear that a particular student

[23] This aphorism is simply illustrated by comparing the manner in which the Sixth Circuit "passed" Ewing, with the obvious time and care expended by the district courts in "failing" the medical students bringing suit in *Watson* v. *University of South Alabama College of Medicine,* 463 F.Supp. 720 (S.D. Ala. 1979), and in *Stoller* v. *College of Medicine,* 562 F.Supp. 403 (M.D. Pa. 1983).

is in such serious academic trouble as to support the decision to terminate that student's medical education. That decision, whether made in a student's first or last year of medical school, remains a decision solely within the province and competence of professional medical school educators.

Chief Judge Feikens, in discussing the meaning of *Horowitz* during the waning moments of the trial in this case, a trial which sorely diverted the talents of the Medical School faculty for many days, pondered aloud whether judges should ever reverse procedurally correct academic decisions, even if they are "dead wrong" substantively. J.A. 93. As stated by another trial judge, also in interpreting *Horowitz,* "there is a difference between a decision that is mistaken and one that is patently arbitrary and capricious—for example, one that is based upon constitutionally impermissible grounds." *Kohler* v. *Hirst,* 460 F.Supp. 412 (E.D. Va. 1978).

Petitioner believes in and contends for such a rule. Judges should never indulge in a substantive review and reversal of academic decisions. Judicial notions of what is or is not arbitrary and capricious can never substitute for the painstaking decision of a professional educator. Even where a student claims that an academic decision is discriminatory on the basis of race, sex or other unlawful motive, courts should limit any substantive review solely to the inquiry whether there is any independent basis for the underlying *academic* decision. Thus, if the decision to dismiss a medical student is "essentially academic", inquiry into its substance should be concluded. *Jansen* v. *Emory University,* 440 F.Supp. 1060, 1063 (N.D. Ga. 1977) (dental

student). Any other rule will invite disaster in the American educational system, "for while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 160 (1963).

If we wish for ourselves the best kind of educational system possible we will leave that system alone. The kind of teachers who fire up a student, the kind you remember all your life, *the kind who evaluated Scott Ewing in this case,* are not the kind who will survive in a society which allows their judgment to be second-guessed by judges.

CONCLUSION

Based upon the foregoing argument and authorities, the judgment of the court of appeals should be reversed.

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IN THE

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OCTOBER TERM, 1985

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

v.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT

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IN THE

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OCTOBER TERM, 1985

No. 84-1273

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

v.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

Respondent Scott E. Ewing ("Ewing") was enrolled as a student in good standing in the University of Michigan's Inteflex Program when, in June 1981, he sat for and failed an examination known as the National Board of Medical Examiners' Part I ("NBME Part I"). J.A at 57.[1] "Because of his failure of the NBME Part I, Ewing was dismissed from the Inteflex Program." Pet. App. at 29a. Ewing was the first and only student ever dismissed for failing this examination on a single occasion. J.A. at 27, 30.

During the year that followed his dismissal, Ewing prosecuted two administrative appeals within the Uni-

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[1] The abbreviations used herein correspond to those identified in footnote 1 at page 1 of petitioner's brief on the merits. "Pet. Brief" indicates a reference to petitioner's brief; "Pet. for Cert." refers to the petition for certiorari.

versity, both of which were denied. Tr. I at 64-65. Accordingly, on August 19, 1982, Ewing brought suit against petitioner Regents of the University of Michigan ("Regents") in the United States District Court for the Eastern District of Michigan. Ewing sought injunctive relief compelling Regents to sponsor him to retake the NBME Part I and, if he passed, to readmit him to the Medical School. Ewing's amended complaint asserted claims based upon: (1) the arbitrary and capricious deprivation of substantive due process under color of state law, actionable pursuant to 42 U.S.C. § 1983 (Count I); (2) breach of contract (Count II); and (3) the principles of promissory estoppel (Count IV).[2]

The Court of Appeals for the Sixth Circuit reversed on Count I,[3] finding that Regents had dismissed Ewing arbitrarily and capriciously. Pet. App. at 28a. In a unanimous opinion filed on September 6, 1984, the Court of Appeals explained its reversal as being premised on three principal considerations: (1) Regents' admission at trial that Ewing was a "qualified" student when he sat for the NBME Part I; (2) Regents' consistent past practice of giving NBME retests, embodied both in the Dean's admission at trial that such retests were "routinely" given and in the undisputed evidence that Ewing was the only student ever denied such a retest; and (3) Regents having memorialized their consistent practice of giving NBME retests by stating in one of their official publications, "Should a [qualified] student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." J.A. at 113-14.

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[2] Count III, a claim for money damages, was dismissed by the District Court prior to trial on a finding that Regents were immune from damages under the eleventh amendment to the United States Constitution. Pet. App. at 4a. Ewing did not appeal the dismissal of Count III.

[3] The Court of Appeals did not reach either Count II or Count IV. Pet. App. at 30a (n.2).

Regents' request for rehearing and rehearing en banc before the Sixth Circuit was denied on October 31, 1984. Pet. App. at 35a. Regents petitioned to this Court for a writ of certiorari on January 29, 1985, and certiorari was granted on March 25, 1985.

A. The Medical School's Inteflex Program

Ewing enrolled in 1975 in a six-year program of study offered jointly by the medical school and undergraduate college of the University of Michigan, known as the Inteflex Program. Inteflex students earn both the baccalaureate and the M.D. degrees. Tr. II at 113. The Inteflex Program accepts annually 50 students after high school and exposes them to a combined curriculum of undergraduate and medical courses, including a medical clerkship, without requiring the students to reapply to medical school after completing their undergraduate studies. Tr. I at 26-27. From a nationwide pool of roughly 450 applicants, Tr. I at 26, Ewing was one of the 10 out-of-state students accepted in 1975. Tr. I at 145.

In addition to the medical students in the Inteflex Program, the University of Michigan Medical School also admits students who have already earned a bachelor's degree into a four-year, traditional medical school program (hereinafter "Standard Program"). Tr. I at 27. Both Inteflex and Standard students earn the same medical degree. J.A. at 27.

The Inteflex Program is divided into three two-year phases. Tr. I at 146; PX 2 at 12-14. Phase I, the first two years, consists predominately of premedical courses, with some medical courses during the last semester. Tr. I at 146. Ewing successfully completed Phase I. Tr. II at 115.

Phase II of the Inteflex Program entails study predominately in the basic medical sciences. Tr. I at 146. Inteflex students take courses during this Phase covering the same general subject matter as Standard students take during their first two years of study. Tr. I at 122-

26; J.A. at 34. Ewing passed all of the required courses in Phase II. Tr. II at 119-20; PX 6. Accordingly, at the time of taking the NBME Part I in June 1981, Ewing had fulfilled every course requirement for the Phase II segment of the Inteflex Program.[4] Tr. II at 120; J.A. at 43.

Phase III of the Inteflex Program, which corresponds to the third and fourth years of the Standard Program, consists of clinical training at the University's affiliated hospitals. Inteflex and Standard students are combined during the clinical phase and receive virtually identical training. Tr. I at 27-28, 147. Immediately prior to these final two years of study, both Inteflex and Standard students take a comprehensive examination known as the NBME Part I. Tr. I at 28, 147-48. All requirements, rules and regulations developed by Regents' Medical School to govern the administration of the NBME Part I apply equally to Inteflex and Standard students, and the two groups of students are indistinguishable in the treatment they receive regarding this examination.[5]

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[4] Ewing's two authorized leaves of absence from the Program between 1975 and 1982 were not considered deficiencies by the Promotion and Review Board, nor did they in any way serve as a basis for his dismissal. Tr. I at 202-204; Tr. II at 90-91.

[5] Senior Associate Dean Robert E. Reed, M.D., who as Director of the Inteflex Program and Chairman of the Promotion and Review Board is the highest ranking official testifying in this case, testified as follows:

Q: Is this NBME part one requirement applicable to both Inteflex and standard enrollment students?

A: Yes.

Q: Is there any deviation in the requirements for the exam, the passing score, the administration of the exam, between standard students and Inteflex students?

A: No.

Q: So with respect to the NBME part one at the time that they are each required to take it they are indistinguishable in the treatment between the two classes of medical school students?

A: That is right.

Reed Deposition at 31. *See also* J.A. at 38; Tr. III at 187.

The National Board of Medical Examiners administers the NBME Part I, *see* PX 4, which consists of approximately a thousand multiple-choice questions intended to test knowledge of the biomedical sciences generally taught during the first two years of a traditional medical school curriculum. Tr. I at 28-30. In setting the passing mark for the NBME Part I, scores are converted to a scale such that those examinees placing in the bottom 8-12% fail regardless of their raw scores. Tr. I at 31-32, 191. The National Board's own guidelines permit any student to take the NBME Part I at least three times in an effort to pass. PX 4 at 16; Tr. I at 87-88. The sole eligibility requirement for taking the NBME Part I is that the individual be enrolled in or graduated from an accredited medical school. PX 4 at 6. *But see* Tr. I at 45 (formerly enrolled students not currently taking courses at the Medical School are eligible to retake the NBME Part I under Regents' sponsorship).

Ewing failed the NBME Part I the first and only time he took it. Tr. II at 133. Ewing was dismissed because of his single failure of this examination. J.A. at 30, 66. If Ewing had passed the NBME Part I, he would have been promoted to the final two-year, clinical phase of his education. J.A. at 40, 58, 80, 81.

All Ewing seeks, in accordance with Regents' established policy, is to retake the NBME Part I and to have the test results determine whether he can go on with his medical education at Regents' school. Tr. III at 12.

B. The Regents' Unbroken Policy and Practice of Allowing Retests of the NBME Part I

Ewing was the only University of Michigan medical student—in either the Inteflex or Standard Program—ever denied a retest of the NBME Part I. J.A. at 27,

30, 38, 73; Tr. I at 83-84, 215. Every other student was given a second chance. *Id.* Since 1975, 40 University of Michigan medical students (both Inteflex and Standard Program) failed the NBME Part I on the first occasion. J.A. at 107-11; Pet. App. at 15a-16a. Every student other than Ewing was permitted a retest, including an Inteflex student (D2) who failed the same session of the test that Ewing failed. J.A. at 111.

At the time Ewing took the NBME Part I, University of Michigan medical students were routinely given a second opportunity to pass the examination if they failed the first time, J.A. at 39; it was a common practice to allow the retest. J.A. at 40. In June 1981, a Medical School publication entitled "On Becoming a Doctor" (PX 3) was issued by the University of Michigan, J.A. at 30-31, 113-14, and distributed on its campus approximately a week before Ewing took the NBME Part I. J.A. at 40. This University publication paraphrased Assistant Dean Ralph M. Gibson, Ph.D., of the Medical School and stated in relevant part:

> According to Dr. Gibson, everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board Exams. *Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam.*

J.A. at 113 (emphasis added).

C. By Regents' Own Standards, Ewing Was a Qualified Student and Therefore Entitled to Retake the NBME Part I

Ewing had passed all of his course work, J.A. at 43, and was a qualified medical student in good standing when he took the NBME Part I. J.A. at 57, Tr. III at 181-82; representation of Regents' counsel, J.A. at 62. Senior Associate Dean Robert E. Reed, himself a medical doctor and Director of the Inteflex Program, testified that

he knew Ewing and his overall record better than anyone at the Medical School, Tr. I at 214, and that Ewing was not unfit to be a doctor because of any problem with his "attitude, personality or moral character." J.A. at 46. Dean Reed further testified that Ewing had clearly demonstrated the intellectual ability to be a doctor, *id.*, and that Ewing had "always" acted "in a manner befitting a medical student and future physician." J.A. at 44.

By the medical faculty's own interpretation of Ewing's record, he had a total of three academic deficiencies out of 23 medical school courses during his entire period of enrollment. Tr. I at 168. *See also* J.A. at 111. Each of Ewing's three prior deficiencies had been successfully removed by the time he sat for the NBME Part I. J.A. at 74; Tr. I at 168-72. *See also* J.A. at 42-43, 81. He had no outstanding deficiencies when he took this examination, J.A. at 57, 81; Ewing had passed every course up to that time. J.A. at 43.

At the time they sit for the NBME Part I, Standard students have generally completed 10 to 13 courses at the Medical School and Inteflex students have completed 22 or 23. J.A. at 105-06. University records[6] reflect that one student was given four opportunities to pass the NBME Part I, even though he had three prior academic deficiencies out of 10 medical school courses. Tr. I at 60; J.A. at 107 (D1). Ten students were permitted to take the examination three times each. J.A. at 107-11; Tr. I at 60. Another 28 students were given two opportunities to pass the NBME Part I. J.A. at 107-11; Tr. I at

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[6] Regents' counsel stipulated to the accuracy of the information compiled in Plaintiff's Exhibit 1. J.A. at 105-06. This exhibit, reproduced at pages 107-12 of the Joint Appendix, represents a "snapshot" of the academic records of both Inteflex and Standard students as of the date they originally took and failed the NBME Part I. Tr. I at 44, 156. Ewing is listed as Inteflex student C1 at page 111 of the Joint Appendix. Tr. I at 151.

60. Inteflex student D2, who failed the examination in June 1981 when Ewing took it, was given three chances to pass, repeating the NBME Part I in September 1981 and June 1982. J.A. at 111. A total of seven Inteflex students were given two or more tries to pass the examination. *Id.* One of these Inteflex students (A3) had academic deficiencies in *nine* of 23 courses prior to failing the NBME Part I. *Id.* Another Inteflex student permitted a retest (D1) had academic deficiencies in four of 23 courses. J.A. at 111.

Of the Standard students permitted NBME Part I retests, student E2 had academic deficiencies in fully 70% of his courses, Tr. I at 133, while students A1, E6 and G3 had deficiencies in roughly half of their courses. J.A. at 107-09. In sum, of the 32 Standard students granted retests, 17 had three or more academic deficiencies out of the 10 to 13 courses they had completed prior to taking the NBME Part I. J.A. at 107-10. Academic deficiencies by Standard students were considered just as serious as those by Inteflex students. J.A. at 38.

SUMMARY OF ARGUMENT

Contrary to Regents' recent efforts to portray this case as one raising questions basic to academic freedom, this case simply concerns fundamental fairness. Ewing does not now, nor has he ever, challenged Regents' exclusive right and broad discretion to establish the rules, requirements and practices that govern the Medical School's treatment of its students. Ewing thus substantially agrees with Regents' contention that courts are ill-equipped to set academic standards, evaluate academic performance and otherwise oversee faculty determinations of grades or test scores. No one wants courts to shoulder the burden of regrading disgruntled students' examinations or be called upon to determine, in the first instance, the requisite standards of academic performance. Nor should courts establish a school's rules and practices.

However, it is well within the traditional province of courts, and essential to a society based on law, to require school officials such as Regents to abide by the very rules that they themselves set. Just as Regents rightfully expect their students to follow the rules, so, too, must they. When a school advances a written rule which it follows with undeviating consistency in every instance but one, and as a result of that single departure from established practice a student is arbitrarily and capriciously dismissed, it in no way infringes on academic freedom to require the school to abide by its *own* rule. To do otherwise would be to ignore the very concepts of justice and fair play that have traditionally distinguished our country's public educational institutions and would accord these institutions a degree of unaccountability heretofore uncontemplated.

Ewing suggests there is no compelling reason for exempting school officials from the rule of law. Our academic institutions are not so fragile nor our educators so timid that judicial review under the strict arbitrary and capricious standard will intimidate them from properly exercising their professional judgment. Although specifically directed at the qualified good-faith immunity of school officials from liability for damages under § 1983, this Court's comments in *Wood* v. *Strickland*, 420 U.S. 308 (1975), are nonetheless instructive. In *Wood* this Court observed that

> absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.

Id. at 320. For much the same reason, a student is entitled to limited substantive due process review to determine if his dismissal—an adverse action with potentially far-reaching consequences—was arbitrary and capricious.

Such minimal review will not improperly impinge on the freedom of academic institutions. Ewing therefore urges this Court to preserve limited substantive review of a student's academic dismissal under the narrow "arbitrary and capricious" standard.

As to the claim of immunity, Ewing's action is not barred because: (1) a suit for injunctive relief against Regents does not run afoul of the eleventh amendment; (2) an amendment to name each regent in his or her official capacity removes any eleventh amendment issue; and (3) Regents, by their conduct in this litigation, have waived any potential immunity.

ARGUMENT

I. THE SIXTH CIRCUIT'S INJUNCTION AGAINST REGENTS IS NOT BARRED BY THE ELEVENTH AMENDMENT

Regents seek to overturn the Court of Appeals' decision by characterizing the judgment as one which this Court's decision in *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89 (1984), would invalidate on eleventh amendment grounds and by asserting, for the first time in this litigation, that Ewing has not adequately named in his amended complaint the officials responsible for governing the University. These contentions are without merit; nonetheless, amendment to name each individual regent in his or her official capacity would easily "cure any potential Eleventh Amendment problems." *Patsy* v. *Board of Regents*, 457 U.S. 496, 515-16, n. 19 (1982).

A. Prospective Injunctive Relief Against State Officials Is Not Barred by the Eleventh Amendment

In several recent opinions, this Court has restated the long-standing principle articulated in 1908 in *Ex Parte Young*, 209 U.S. 123 (1908), that the eleventh amendment does not bar suits for prospective injunctive relief against state officials sued in their official capacity. *See*

e.g., *Kentucky dba Bureau of State Police* v. *Graham*, 53 U.S.L.W. 4966 (U.S. June 25, 1985); *Brandon* v. *Holt*, 469 U.S. ——, 105 S. Ct. 873 (1985), and *Hutto* v. *Finney*, 437 U.S. 678 (1978). This is the relief awarded Ewing by the Sixth Circuit Court of Appeals.

1. Pennhurst *Is Inapplicable to an Action Against State Officials for Federal Law Violations*

This Court's decision in *Pennhurst* has no application here. *Pennhurst* involved the power of federal courts to issue judgments requiring state officials to conform their behavior to state law. In contrast, this case concerns a violation of federal law, 42 U.S.C. § 1983, by state officials.

Pennhurst does not preclude prospective injunctive relief against state officials for violations of federal law. *Kentucky dba Bureau of State Police* v. *Graham*, 53 U.S.L.W. 4966, n. 18 (U.S. June 25, 1985). The inapplicability of *Pennhurst* as a bar to relief was reconfirmed by this Court's recent decision in *Brandon* v. *Holt*, 469 U.S. ——, 105 S. Ct. 873 (1985), which cites with approval *Hutto* v. *Finney*, 437 U.S. 678 (1978), for the proposition that prospective injunctive relief against state officials for § 1983 violations is not barred by the eleventh amendment. *See also*, *Lee* v. *Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062 (6th Cir. 1984); *Barnes* v. *Cohen*, 749 F.2d 1009, 1019 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 2126 (1985). The interpretation of federal law by the Court of Appeals here simply does not raise the same issues of federalism which underlie the *Pennhurst* decision. Thus, Regents' reliance on *Pennhurst* as a justification for reversal is misplaced.

2. *Ewing's Suit Is Properly Construed To Be Against the Officials Who Control the University of Michigan*

By suing the Board of Regents, rather than the University or the State of Michigan directly, Ewing sued the officials responsible for the operation of the University in their official capacities. The Board of Regents of the

University of Michigan is "a body corporate" charged with supervising the University and managing its funds. Michigan Constitution of 1963, Article 8 § 5.

Because of the nature of "official capacity" litigation under 42 U.S.C. § 1983, a complaint naming the office or the agency, but not the current agents by individual name, is properly construed as a suit against the officials in their official capacities. In *Weisbord* v. *Michigan State University*, 495 F. Supp. 1347 (W.D. Mich. 1980), for example, a plaintiff seeking relief under 42 U.S.C. § 1983 and other statutes named as defendants the Board of Trustees and the President of Michigan State University. The court held that, even though "[p]laintiff has technically not named any state officials as defendants," *id.* at 1355, "the court will construe the complaint as one against the state officials who constitute the Board of Trustees and the President of Michigan State University in their official capacities." *Id.* The court noted that "[t]o do otherwise would be to exalt form over substance. . . ." *Id.*

Similarly, in *Kolar* v. *County of Sangamon of State of Ill.*, 756 F.2d 564, 568 (7th Cir. 1985), the Seventh Circuit held that those § 1983 actions which fail to designate expressly the nature of the suit by using the terms "official capacity" or "individual capacity," but which nonetheless list in the case name of the complaint the official's job title, shall be construed as "official capacity" suits. *See also Wolf-Lillie* v. *Sonquist*, 699 F.2d 864, 869 n. 12 (7th Cir. 1983).

In *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978), based on the same principles, the Second Circuit permitted plaintiffs in a class action civil rights suit to join individual officials in their official capacities as defendants after the trial was concluded. In permitting the amendment, the court noted that § 1983 actions implicate three different types of entities: (1) corporate bodies; (2) constituent members

of corporate bodies in their official capacities; and (3) constituent members in their individual capacities. The court held that the first two categories, corporate bodies and their members in their official capacities, are, for jurisprudential purposes, "interchangeable before, during and after trial." *Id.* at 140.

In *Kentucky dba Bureau of State Police* v. *Graham*, 53 U.S.L.W. 4966 (U.S. June 25, 1985), this Court also expressly acknowledged that official capacity suits under § 1983 are in reality "only another way of pleading an action against an entity of which an officer is an agent." *Id.* at 4967 (quoting *Monell* v. *Department of Social Services*, 436 U.S. 658, 690 n. 55 (1978)). This Court further stated that "[a]s long as the government entity receives notice and an opportunity to respond, an official capacity suit, is, in all respects other than name, to be treated as a suit against the entity." *Id.* (citation omitted).

Throughout this litigation, Regents have consistently treated this case as an action against the individual regents in their official capacities. Regents moved on eleventh amendment grounds to dismiss Count III of Ewing's complaint for money damages, but pressed no similar defense with regard to Ewing's three remaining counts for injunctive relief. In fact, Regents affirmatively represented in their briefs to the District Court that Ewing would be entitled to injunctive relief if he proved his claim. *See e.g.*, J.A. at 11 ("Because the defendants [i.e., Regents] have interposed the defense that the Eleventh Amendment prevents recovery of money damages, the only relief which plaintiff can obtain if he is successful is equitable"). *See also* J.A. at 5, 12. Indeed, just as Regents often referred to themselves in the plural as "defendants," thereby evincing their understanding that it was they who were being sued and not the University itself, so, too, did the District Court in its opinion. Pet. App. at 26a-27a.

B. If a Pleading Defect Exists, Ewing May Simply Amend His Complaint to Conform to the Evidence Under *Brandon* v. *Holt*

If in fact a pleading defect exists here, a straightforward application of Rule 15(b) of the Federal Rules of Civil Procedure provides a complete resolution of the issue. *See also* 28 U.S.C. § 1653. In fact, Ewing has moved to amend to name specifically as defendants the individual regents in their official capacities. Once made, there is no question that the eleventh amendment is inapplicable. *Ex Parte Young*, 209 U.S. 123 (1908). Indeed, just such an amendment to cure a pleading defect in an action brought under 42 U.S.C. § 1983 was recently sanctioned by this Court in *Brandon* v. *Holt*, 469 U.S. ——, 105 S. Ct. 873 (1985). In *Brandon*, this Court permitted a complaint originally naming the Director of Police of the City of Memphis to be amended to include the city as a defendant, even though the case had been fully tried and appealed. Holding that F.R.C.P. 15(b) would permit plaintiff to amend, this Court observed that "even at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the District Court's findings of fact." *Id.* at 877-78.

In explaining the basis for the majority decision in *Brandon*, Justice Stevens wrote that courts should interpret Rule 15(b) liberally and permit an amendment whenever doing so will effectuate the underlying purpose of the rule. 469 U.S. ——, 105 S. Ct. at 878. The Court further noted that the amendment should be allowed "so long as the opposing party has not been prejudiced in presenting his case." 469 U.S. ——, 105 S. Ct. at 877. *See also Patsy* v. *Board of Regents*, 457 U.S. 496, 515-16 n. 19 (1982) (where in reinstating a civil rights action dismissed on the pleadings, this Court also specifically acknowledged that the district court could "permit

amendments to the pleadings that might cure any potential Eleventh Amendment problems").

Permitting plaintiffs to substitute as defendants the constituent members of a corporate body for that body by amendment has been endorsed by the courts of appeals. *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). *Cf. Jackson* v. *Hayakawa*, 682 F.2d 1344 (9th Cir. 1982); *Gay Students Org. of Univ. of New Hampshire* v. *Bonner*, 509 F.2d 652 (1st Cir. 1974); *Miener* v. *State of Missouri*, 673 F.2d 969, 981 (8th Cir. 1982).

Regents are not prejudiced in allowing an amendment here, since the members of the Board of Regents face no individual or personal liability. The evidence at trial proved a violation of § 1983 by the University's official agents, the deans and faculty members of the Medical School. Regents in their official positions are responsible for the conduct of these school officials and have the ultimate authority to dismiss or reinstate students.

C. Even if Regents Were Entitled to Some Form of Immunity, They Have Waived That Immunity

In this litigation, Regents have on many occasions conceded that they are not entitled to immunity from injunctive relief. While the eleventh amendment may be raised on appeal, Regents' conduct here constitutes a waiver of any immunity which Regents may have had. *See Toll* v. *Moreno*, 458 U.S. 1 (1982). In *Toll*, this Court held that a university had waived its eleventh amendment immunity by its conduct. The plaintiff in *Toll* had brought an action for declaratory and injunctive relief against the state-operated University of Maryland and its president. In seeking a stay of an injunction order requiring tuition refunds pending appeal, the university represented to the district court that in the event the order appealed from was affirmed, it would make funds available to make refunds in accordance with the

judgment. Based on this action by the university, this Court held that it had waived any eleventh amendment immunity to which it may have been entitled. 458 U.S. at 18. The Seventh Circuit reached the same conclusion based on similar facts in *Vargas* v. *Trainor*, 508 F.2d 485, 492 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975), holding that defendant had waived the eleventh amendment by its representation to the court.

While the District Court here in dismissing Count III for money damages found no waiver of immunity from suits for money damages, by statute or by purchasing insurance or by virtue of the Michigan Court of Claims Act, Pet. App. at 9a-11a, the court was not asked by Regents to consider the question of immunity from injunctive relief, nor did it do so. Moreover, Regents omitted any reference to the eleventh amendment in their trial memorandum, during the trial itself, in their post-trial memorandum, in their original brief in the Court of Appeals and in argument there. Their contention in their rehearing petition in the Sixth Circuit was limited to an asserted eleventh amendment bar to *retroactive* injunctive relief. Only in their petition to this Court did Regents press an eleventh amendment argument which would bar even prospective injunctive relief.

Having waived the defense as to the injunction counts, under the teaching of *Toll* v. *Moreno*, 458 U.S. at 18, Regents are barred from resurrecting the defense. This is especially appropriate here, since, if timely raised, Ewing would simply have amended his complaint to list the then sitting regents on the Board. *See also Spielberg* v. *Board of Regents, University of Michigan*, 601 F. Supp. 994 (E.D. Mich. 1985) (Feikens, J.) (§ 1983 claim against Regents adjudicated without reference in published opinion to eleventh amendment defense). As a policy matter, Regents should not be encouraged to "ambush" successful plaintiffs in this manner.

II. THIS COURT SHOULD PRESERVE LIMITED SUBSTANTIVE DUE PROCESS REVIEW OF A STUDENT'S ACADEMIC DISMISSAL UNDER THE STRINGENT ARBITRARY AND CAPRICIOUS STANDARD

A. Lower Courts Have Long Recognized Academic Dismissals Are Reviewable for Their Conformance to Substantive Due Process Under the Arbitrary and Capricious Standard

As this Court observed in *Board of Curators* v. *Horowitz*, 435 U.S. 78 (1978), a "number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or capricious.'" *Id.* at 91 (citations omitted). Indeed, long ago the Supreme Court of Wisconsin recognized in a case involving a dismissed medical student from a private university, *Frank* v. *Marquette University*, 209 Wis. 372, 245 N.W. 125 (1932), that "[t]he law is apparently well settled that a university, college, or school may not arbitrarily or capriciously dismiss a student or deny to him the right to continue his course of study therein." 245 N.W. at 127 (citations omitted).

More recently, in another case involving a dismissed medical student and often cited as authority in this area, *Connelly* v. *University of Vermont and State Agr. Col.*, 244 F. Supp. 156 (D. Vt. 1965), a district court noted that even though school authorities generally have "absolute discretion" in educational matters, "when the school authorities abuse this discretion . . . a court may interfere with their decision to dismiss a student." *Id.* at 160. The court went on to hold that insofar as the student had alleged that his dismissal was arbitrary, capricious or in bad faith, "he has stated a cause of action," which "if proven, this Court would be justified in affording the plaintiff appropriate relief." *Id.* at 161. The Sixth Circuit applied a similar standard here. Pet. App. at 31a-32a (quoting *Stevens* v. *Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981)).

The rationale behind *Connelly* has been echoed by an impressive number of federal courts of appeals. Besides the Sixth Circuit below, the Third Circuit recently approved of a decision in which a district court explicitly held that a medical student "has a constitutionally protected [property] interest in continuing with his medical education, [and as such] substantive due process requires that his medical education not be terminated for 'arbitrary or capricious' reasons." *Stoller* v. *College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd* 727 F.2d 1101 (3d Cir. 1984). Similarly, the Eighth Circuit has observed,

> It is true that courts will ordinarily defer to the broad discretion vested in public school officials and will rarely review an educational institution's evaluation of the academic performance of its students. [Citations omitted.] Notwithstanding this customary "hands-off" policy, judicial intervention in school affairs regularly occurs when a state educational institution acts to deprive an individual of a significant interest in either liberty or property.

Greenhill v. *Bailey*, 519 F.2d 5, 7 (8th Cir. 1975); *accord*, *Hines* v. *Rinker*, 667 F.2d 699, 703 (8th Cir. 1981). Similarly, the Tenth Circuit stated in *Gaspar* v. *Bruton*, 513 F.2d 843 (10th Cir. 1975), that "[c]ourts have historically refrained from interfering with the authority vested in school officials to drop a student . . . absent a clear showing that the officials have acted arbitrarily or have abused the discretionary authority vested in them." *Id.* at 850 (citations omitted). Additionally, the Fifth Circuit expressly held the arbitrary and capricious standard appropriate for limited judicial review of an academic decision. *Debra P.* v. *Turlington*, 644 F.2d 397, 404 (5th Cir. 1981).

Several federal district courts and state courts have also either implied or expressly held that "[t]he standard of review of academic judgments of an educational institution is whether the decision is arbitrary,

capricious, or in bad faith." *Neel* v. *I.U. Board of Trustees*, 435 N.E.2d 607, 613 (Ind. App. 1982).[7] In *Gray* v. *Canisius College of Buffalo*, 76 A.D.2d 30, 430 N.Y.S.2d 163 (App. Div. 1980), a case involving a dismissed college professor, the court held:

> [A]n appropriate inquiry may be made, not for the purpose of substituting the judgment of the court for the judgment and discretion of the respondents [the school officials], but to determine whether respondents' action in terminating Dr. Gray's services violated the college rules and was arbitrary and capricious, i.e., whether the respondents complied with their own rules concerning tenure and properly exercised their discretion in terminating Dr. Gray's services.

430 N.Y.S.2d at 168. This is the standard invoked by Ewing here. *Cf. Barsky* v. *Board of Regents*, 347 U.S. 442, 456, 462 (1954) (review under the arbitrary and capricious standard of disciplinary action suspending physician's license). The question before this Court is not, contrary to Regents' characterization of it, whether Ewing was "deficient" academically—a matter wholly inappropriate for judicial review—but rather whether Regents arbitrarily and capriciously dismissed Ewing in disregard of their own rule that every student deemed initially qualified to take the NBME Part I had two chances to pass.

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[7] *E.g.*, *Crook* v. *Baker*, 584 F. Supp. 1531 (E.D. Mich. 1984); *Black* v. *Sullivan*, 561 F. Supp. 1050, 1061 (D. Me. 1983); *Bleicker* v. *Board of Trustees of Ohio State*, 485 F. Supp. 1381 (S.D. Ohio 1980); *Aubuchon* v. *Olsen*, 467 F. Supp. 568 (E.D. Mo. 1979); *Watson* v. *Univ. of So. Alabama Coll. of Medicine*, 463 F. Supp. 720 (S.D. Ala. 1979); *Depperman* v. *University of Kentucky*, 371 F. Supp. 73 (E.D. Ky. 1974); *Tedeschi* v. *Wagner Coll.*, 49 N.Y.2d 652, 427 N.Y.2d 760, 404 N.E.2d 1302 (Ct. App. 1980); *Maitland* v. *Wayne State University Medical Sch.*, 76 Mich. App. 631, 257 N.W.2d 195 (Ct. App. 1977); *Militana* v. *University of Miami*, 236 So.2d 162 (Fla. App. 1970), *cert. denied*, 401 U.S. 962 (1971); *Mustell* v. *Rose*, 282 Ala. 358, 211 So.2d 489, *cert. denied*, 393 U.S. 936 (1968). For a discussion of several cases dating from before the turn of the century, see 6 A.L.R. 1533.

More than half a century of holdings and considered dicta utilizing the arbitrary and capricious standard cannot be dismissed lightly; moreover, Regents have not pressed a claim that some courts have rejected such review. *See* Ewing's Brief in Opposition at 19-20 n. 9. This situation, then, contrasts sharply with the cirmumstances that confronted this Court in *Horowitz*. 435 U.S. at 87-88. There, until the Eighth Circuit had held that academic dismissals require a hearing before the school's decision-making body, "state and federal courts, over a period of 60 years, unanimously [held] that formal hearings" were not required. *Id.* at 88.

Under Regents' present formulation, even the appropriately limited substantive review conducted by this Court in *Horowitz*—which led to the findings that "the record clearly shows that the school followed its established rules," *id.* at 92 n.8, and "no showing of arbitrariness or capriciousness has been made in this case," *id.* at 92—would be impermissible. What is more, its broad discretion in academic matters notwithstanding, the community of medical educators at large seems well aware that it is not entitled to act arbitrarily and capriciously with impunity. *See, e.g.*, Irby, Fantel, Milam and Schwarz, *Special Report: Legal Guidelines for Evaluating and Dismissing Medical Students*, 304 NEW ENGLAND JOURNAL OF MEDICINE 180, 182 (1981) ("arbitrary and capricious steps by the faculty are actionable, but the burden of proof is on the student"). Indeed, Regents seemed content to live by this rigorous standard until their defeat in the Sixth Circuit. *See* J.A. at 26. In this regard Regents are like the Medical School of University of California at San Francisco, which in *Wong* v. *Regents of the University of California*, 15 Cal. App.3d 823, 93 Cal. Rptr. 502 (Ct. App. 1971), "conceded . . . that the dismissal of a medical student may be judicially set aside where it appears to have been arbitrary, capricious or in bad faith." 93 Cal. Rptr. at 506. Regents having made a similar concession before the Court of Appeals, J.A. at 26, should not now be permitted to reformulate their position.

B. Ewing's Property Interest

1. *The Sixth Circuit's Analysis of Ewing's Property Interest Is Correct*

At the outset of this litigation, Ewing alleged in his Amended Complaint, "[u]nder Michigan law, Ewing enjoys a property right and interest in his continued enrollment in the Inteflex Program. . . ." J.A. at 15. Ewing has never claimed an inherent right to an education nor has he claimed a right to be admitted to medical school in the first place. Consequently, Regents' impressive recitation of cases discrediting such "rights," Pet. Brief at 39, is simply irrelevant to this case. Several courts have, however, recognized a student's property interest in continued enrollment. *E.g., Stoller* v. *College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd* 727 F.2d 1101 (3d Cir. 1984); *Gaspar* v. *Bruton*, 513 F.2d 843, 850 (10th Cir. 1975); *Hall v. University of Minnesota*, 530 F. Supp. 104, 107 (D. Minn. 1982). Although specifically involving public high school students, this Court, too, has held that, once provided, public education becomes "a property interest which may be protected by the Due Process Clause. . . ." *Goss* v. *Lopez*, 419 U.S. 565, 574 (1975).

The Court of Appeals here held that "an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections." Pet. App. at 31a. Regents nonetheless argue, "According to the Sixth Circuit, this property interest also embraced the right to a second chance on the NBME Part I. . . ." Pet. Brief at 40. Regents submit that this "ignored a significantly relevant decision rendered by another panel of the same court which found, under comparable Tennessee law, that a medical student had no property right in a retest on the NBME examination. *Stevens* v. *Hunt*, 646 F.2d 1168,

1170 (6th Cir. 1981)." Pet. Brief at 40. Such an analysis, however, misinterprets the Sixth Circuit's holding in this case. It was not the University's violation of its retest rule *per se* that established a cognizable constitutional violation, but rather its violation of "an implied understanding that a student shall not be arbitrarily dismissed from his university." Pet. App. at 31a.

It is, of course, well settled that a university's violation of its own rule, even a publicly promulgated one as is the case here, will not in every instance, in and of itself, rise to the level of a constitutional violation. *See, e.g., Jones* v. *Board of Governors of University of North Carolina*, 704 F.2d 713, 716-17 (4th Cir. 1983). But when a university's failure to abide by its own rule or established practice results in the deprivation of a recognized property interest by a student being arbitrarily dismissed, constitutional protections are properly brought to bear.

Regents' characterization of *Stevens* v. *Hunt, supra*, is wrong in still other respects. In *Stevens* the plaintiffs "contended that they were vested with a property right to take the NBME examination a third time. . . ." 646 F.2d at 1169. Ewing alleges no such interest, nor did the Sixth Circuit find such an interest. Ewing simply seeks to take the NBME examination a *second* time—in conformance with the University's retest rule—so as to protect his property interest in not being arbitrarily dismissed.

Finally, Regents' recognition of Ewing's property interest is traceable back to the early days of this litigation when, in replying to Ewing's Amended Complaint, Regents stated, "Defendant admits that, under Michigan law, plaintiff may have enjoyed a property right and interest in his continued enrollment in the Inteflex Program." J.A. at 21. Also significant, as was noted by the American Association of University Professors, is Regents' failure to raise this question in the petition for certiorari. Brief of AAUP as Amicus Curiae at 10 n.17.

Indeed, Regents have already conceded that the Court of Appeals' contract analysis was "applicable to and correctly applied by the Sixth Circuit to respondent's demonstration that he had a property right so as to invoke the protection of § 1983 in the first instance. . . ." Pet. for Cert. at 20. As a result, Regents are now barred from raising this question anew in their brief on the merits. *See* Rule 34.1(a) ("the brief may not raise additional questions or change the substance of the questions already presented").[8] *See also American National Bank & Trust Company of Chicago* v. *Haroco*, —— U.S. ——, 105 S.Ct. 3291 (1985).

2. *The Nature of Ewing's Protectible Property Interest*

Property interests, as this Court has frequently observed, are created and defined by state law and may encompass contractual provisions or mutual implied understandings. *Jago* v. *Van Curen*, 454 U.S. 14, 18 (1981); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); *Perry* v. *Sindermann*, 408 U.S. 593, 601-02 (1972).[9]

Ewing's protectible property interest arises from his contractual relationship with the University, which is

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[8] Similarly, certain portions of the briefs filed by Regents' amici raise questions beyond the ambit of those certified for review by this Court. Thus, the Court should decline to consider the United States' contentions that (1) substantive due process protection cannot be afforded to protect property interests and (2) Ewing has no protectible property interest. Indeed, in a decided understatement, the United States concedes that these issues were "perhaps not expressly challenged by petitioner." Brief of United States as Amicus Curiae at 9. An argument raised by an amicus but not by either party should not be addressed. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60, n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 531, n.13 (1979).

[9] Petitioner cites this Court's decision in *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458 (1981), for the proposition that "statistical probabilities standing alone generate no constitutional protections." Pet. Brief at 44. *Dumschat*, however, is inapplicable here. This case involves a protectible property interest, not an alleged liberty interest as in *Dumschat*, a distinction found important in *Jago, supra* at 18, 20 (explaining *Dumschat*).

grounded in a mutual understanding between the parties that Ewing would be treated in conformity with the rules and regulations established by the Medical School to govern its relations with all students. In *Ross* v. *Pennsylvania State University*, 445 F. Supp. 147 (M.D. Pa. 1978), a case relied on by Regents, a district court held that a graduate student had a property interest in continued enrollment, *id.* at 153, and that this interest arose from the contractual nature of the student-university relationship. *Id.* at 152. The student's property interest existed "[p]ursuant to state law" which had "long recognized" the contractual relationship between a student and the university he attends. *Id.* (citing *Barker* v. *Trustees of Bryn Mawr College*, 278 Pa. 121, 122 A. 220 (1923)).[10]

The Sixth Circuit followed a similar line of reasoning here. Pet. App. at 30a-31a. It observed that the Michigan Supreme Court's view of the student-university contract, expressed in *Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909), established Ewing's right under Michigan law to be free from arbitrary dismissal. Indeed, the *Booker* opinion explicitly states, "when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom." Pet. App. at 31a (quoting 156 Mich. at 99-100).

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[10] "The most pervasive and enduring theory [of the student-university relationship] is that the relationship between a student and an educational institution is contractual in nature." *Neel* v. *I.U. Board of Trustees*, 435 N.E.2d 607, 610 (Ind. App. 1982). This legal theory's lineage is as impressive as it is extensive. *E.g.*, *People ex rel. Cecil* v. *Bellevue Hospital Medical College*, 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct.), *aff'd*, 128 N.Y. 621, 28 N.Y. 253 (1891); *Nelson* v. *Lincoln Medical College*, 81 Neb. 533, 116 N.W. 294 (1908); *Steinberg* v. *Chicago Medical School*, 69 Ill. 2d 320, 371 N.E.2d 634 (1977); *Corso* v. *Creighton University*, 731 F.2d 529 (8th Cir. 1984). Both *Steinberg*, *supra* at 330, and *Corso*, *supra* at 531, established that controlling terms in the student-university contract need not derive from a university's official bulletin alone. In *Steinberg* the contractual terms arose from statements contained in the school's admissions brochure; in *Corso* they arose from a student handbook.

Even should this Court take the view that, "unlike other contracts, the terms of the educational contract are not defined in a formal, integrated agreement [and] [i]n seeking to determine the intent of the parties, the courts have held that 'the standard is that of reasonable expectation—what meaning the party making the manifestation, the University, should reasonably expect the other party to give it,'" Brief of Duke University et al. at 16 (citations omitted), Ewing would still prevail. Indeed, long before the University published "On Becoming a Doctor," Ewing was well aware of Regents' policy and practice of granting NBME retests to students who needed them. Tr. II at 132, 135-36. Ewing's awareness of this practice was further confirmed by Burt N. La Du, M.D., Ph.D., the Chairman of the Pharmacology Department from 1974 to 1980, who informed Ewing of the school's NBME retest policy weeks in advance of the date on which Ewing took the examination. Tr. II at 127-32; Tr. III at 174-78.

Additionally, after learning of his failing NBME Part I score, Ewing met with Dean Reed, the Director of the Inteflex Program and Chairman of the Promotion and Review Board, to discuss his situation. J.A. at 59; Tr. II at 133-35; Tr. I at 212-15. Ewing testified that Dean Reed told him he would not be dismissed as a result of his NBME failure. J.A. at 59. In fact, so certain was Dean Reed that Ewing would not be dismissed, he even discussed with Ewing the modified schedule Ewing would have to follow until he passed the examination. Tr. II at 134; Tr. I at 213. At trial, Dean Reed corroborated Ewing's version of their meeting in substance.[11]

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[11] Dean Reed's best recollection was that he had told Ewing he did not "think" Ewing would be dismissed. Dean Reed testified as follows:

> Q: At that time, Dr. Reed, would it be correct to say you knew more about Mr. Ewing's record than anybody on the Medical School faculty?
>
> A: I think that's correct.

[Continued]

This exchange between Reed and Ewing is significant for a number of reasons. As Chairman of the Promotion and Review Board, Dean Reed was uniquely empowered to represent the Board. Dr. Friedman, himself a Board member, confirmed that "[t]he only person who speaks for the Promotion Board is Dr. Reed." Tr. III at 289. As the most senior official testifying in this litigation, Dean Reed's representations to Ewing as to the nature of Regents' practice must necessarily carry great weight. Furthermore, his statements cannot be dismissed as simply the offhand remarks of an uninformed school official. Dean Reed was fully aware of Ewing's entire record, including any prior deficiencies he might have had, his failing NBME score and the warning letters he had received. Tr. I at 214-15. Dean Reed in fact knew more about Ewing and his record than anyone at the Medical School. *Id.* And he knew that no Inteflex student, no matter what his prior academic record, *see* J.A. at 111,

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[11] [Continued]

Q: And you knew all about these three courses that he had taken and [are] listed as deficiencies in Exhibit 1?

A: Yes.

Q: And you knew all about whatever warnings had been given to him?

A: Yes.

Q: You had given him those warnings?

A: Yes.

Q: And yet your answer to Mr. Ewing was, at that time, and your opinion at the time, [was that] you did not think he would be dismissed because of his failure?

A: At that moment.

Q: At that moment, that's what you believed; is that right?

A: That's how I responded to his question, that's right.

Q: And you responded truthfully, didn't you?

A: Oh, yes.

Q: Up to that point in time, throughout the whole tenure of the Inteflex Program, no student had been denied a second opportunity to take the NBME Part I?

A: That's correct. [Tr. I. at 214-15.]

had ever been denied a second chance to pass the NBME examination. Tr. I at 214-15.

Dean Reed's representations, attitude and conduct during his July 20, 1981, meeting with Ewing confirm the existence of Regents' NBME retest rule and attest to its applicability to Ewing. Yet, just four days later, without forewarning or intervening discussion between Ewing and Reed, Ewing learned by letter he had been dismissed from enrollment during a Promotion and Review Board meeting presided over by Dean Reed. *See* DX 20. Such an action, taken on Regents' behalf by the Promotion and Review Board, was arbitrary and capricious. There can be no doubt that "the party making the manifestation" here, Dean Reed, should have "reasonably expect[ed] the other party," Ewing, to have interpreted his statements as he did. *See also Vail* v. *Board of Education*, 706 F.2d 1435, 1440 (7th Cir. 1983), *aff'd by equally divided Court*, 104 S.Ct. 2144 (1984).

C. State Law Remedies Are no Bar to Bringing a § 1983 Action in Federal Court

While Ewing has a claim for breach of contract against Regents under Michigan law, he also has a distinct claim under 42 U.S.C. § 1983 for arbitrary deprivation of a constitutionally protected interest. *See Vail* v. *Board of Education of Paris Union School District*, 706 F.2d 1435, 1448 (7th Cir. 1983) (Eschbach, J., concurring) *aff'd by equally divided Court*, 104 S. Ct. 2144 (1984). Regents argue that Ewing should have brought his § 1983 claim along with his state law claims in state court, without stating a reason why. Both state and federal courts would be applying the same federal statute and be empowered to enforce the same remedies, and Ewing has the right to choose the federal forum if he wishes. *Maine* v. *Thiboutot*, 448 U.S. 1, 3, n. 1 (1980). Indeed, § 1983 was enacted out of concern that state courts would not adequately vindicate constitutionally protected rights.

See Haring v. *Prosise*, 462 U.S. 306, 323 (1983); *Mitchum* v. *Foster*, 407 U.S. 225, 241-42 (1972).

While this Court has in previous cases acknowledged that the remedy provided under § 1983 is in some respects parallel to state tort law remedies, it has declined to eliminate the federal law relief Congress provided. *See, e.g., Carey* v. *Piphus*, 435 U.S. 247 (1978); *Mitchum* v. *Foster*, 407 U.S. 225 (1972). *See also Allen* v. *McCurry*, 449 U.S. 90 (1980) (in enacting § 1983, Congress deliberately added to the jurisdiction of federal courts, without eliminating state court jurisdiction).

Lower courts have also declined to hold that the existence of state law remedies displaces § 1983 remedies in federal court. *See Vail* v. *Board of Education of Paris Union School District, supra*; *Hall* v. *Tawney*, 621 F.2d 607, 612 (4th Cir. 1980).[12] The federal statute's interest is to prevent unlawful deprivations of property under color of state law, an interest distinct from mere enforcement of contracts. It is "purest coincidence if state law remedies for violations of common-law rights by private citizens were fully appropriate to redress" violations of constitutional rights. *Monroe* v. *Pape*, 365 U.S. 167, 196 n. 5 (1961) (Harlan, J., concurring).

D. Adequate Procedural Due Process Does Not Compensate for Lack of Substantive Due Process

Regents argue that "the Seventh Circuit has adopted a district court opinion which holds that if the plaintiff fails to present a case for violation of procedural due process, 'it follows that no substantive due process claim has been stated either.' *McElearney* v. *University of*

[12] *Parratt* v. *Taylor*, 451 U.S. 527 (1981), holding state remedies adequate and *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), holding state remedies inadequate are both procedural due process cases and do not apply to Ewing's challenge on substantive due process grounds. No panoply of procedural rights can supplant Ewing's substantive right not to be arbitrarily dismissed. Significantly, Regents cite neither case in support of their position.

Illinois, 612 F.2d 285, 291 (7th Cir. 1979)." Pet. Brief at 36. But adequate procedural due process cannot compensate for a lack of substantive due process.

Regents' misguided interpretation of *McElearney* seems a result of quoting the Seventh Circuit out of context. In fact, the court had found that "there is no protected property interest involved in this case." 612 F.2d at 290. Therefore, "[b]ecause the court finds that the complaint does not allege facts adequate to state a claim for violation of plaintiff's right to procedural due process, it follows that no substantive due process claim has been stated either." *Id.* at 291 (citation omitted). In other words, because the plaintiff was unable to establish even the first element necessary for a § 1983 claim—the existence of a protectible property (or liberty) interest—no due process violation, whether procedural or substantive, could possibly have been found. This reading of *McElearney* is further confirmed by an even more recent Seventh Circuit decision, *Vail* v. *Board of Education*, 706 F.2d 1435, 1440 (7th Cir. 1983) *aff'd by equally divided court*, 104 S. Ct. 2144 (1984). There the court explained *McElearney* as dealing with informal assurances that failed to establish a reasonable reliance sufficient to create a protectible property interest.

The due process clause protection of substantive rights to liberty and property cannot be vitiated by compliance with minimal procedural due process standards.

> The Due Process Clause imposes substantive limitations on state action, and under proper circumstances these limitations may extend to intentional and malicious deprivations of liberty and property even where compensation is available under state law.

Parratt v. *Taylor*, 451 U.S. 527, 552-53 (1981) (Powell, J., concurring; footnotes omitted).

E. Ewing Opposes *De Novo* Reviews of Students' Academic Records

The wisdom of this Court's comment in *Horowitz*—that "courts are particularly ill-equipped to evaluate aca-

demic performance," 435 U.S. at 92—is perhaps best appreciated upon reading the District Court's impermissible excursion into the academic world of evaluation and grading. Ewing has no quarrel with the argument that "federal courts should not conduct their own *de novo* review of the merits of academic decisions. . . ." Brief of the American Council on Education et al. as Amici Curiae Supporting Petitioner at 18. The Sixth Circuit, however, carefully avoided such a *de novo* review while conducting an appropriately limited substantive review of Ewing's dismissal.

1. *The District Court Engaged in an Improper* De Novo *Review of Ewing's Academic Record*

The shortcomings of a *de novo* review of an academic record are easily enough illustrated by reference to the District Court's opinion. For example, the District Court catalogues in the first three paragraphs of section IA of its opinion, Pet. App. at 13a-14a, Ewing's progress in various courses taken between 1975 and 1979. Yet in adopting its own definition of a "deficiency," the District Court ignored altogether Dean Reed's testimony that Ewing had *no* academic deficiencies, as that term is defined by the Promotion and Review Board, prior to 1979. J.A. at 56-57. After 1979, again as defined by the Promotion Board, Ewing had a total of three deficiencies, Tr. I at 168; each of these deficiencies was formally removed by the Board. J.A. at 74, 80-81. *See, e.g.*, J.A. at 115 (letter from Dean Reed notifying Ewing of removal of deficiency). Indeed, the District Court's implication that makeup examinations, reschedulings or leaves of absence somehow show Ewing to have been a problem student is directly contrary to Dean Reed's testimony that such occurrences were not extraordinary nor out of keeping with the Promotion Board's general practice. Tr. II at 106-07.

The District Court's recitation of certain letter and numerical grades of Ewing, Pet. App. at 13a-14a, is similarly misguided. Such an analysis ignores Dean Reed's testimony that students in the Inteflex Program

were expected to maintain a C (2.0) average in order to remain in good standing. Tr. I at 201. Ewing had an overall average of a B– (2.769) at the time of his dismissal. Tr. I at 202; PX 6. Furthermore, the District Court failed to appreciate the extremely selective nature of the Inteflex Program and the fact that Inteflex students generally compete only against one another in their science courses. Tr. I at 200-01.[13]

In another example, the District Court found, "It is significant that it took him [Ewing] three years to complete the first two years of the program." Pet. App. at 17a. Although the District Court found this significant, Regents' Promotion and Review Board did not. Dean Reed testified that Ewing completed Phase I of the Program within two years of registration (three calendar years because of a leave of absence) and that the time Ewing took was not a deficiency nor had the Promotion Board considered it in dismissing him. Tr. I at 202. *See also* Tr. II at 90-91.

Elsewhere, the District Court commented, "courts are completely unable to afford review [of a medical student's clinical performance because] . . . the student's actual functioning in a clinical experience, can no longer be directly observed and evaluated." Pet. App. at 26a. Ewing agrees. So far Ewing's only clinical evaluation has been in the Introductory Clerkship, completed just days before his dismissal, in which he received the highest grade possible, an Honors. J.A. at 117. However, the District Court's *de novo* review makes no mention of this performance, or of the fact that Ewing was the only Inteflex student, of all those who failed the NBME Part

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[13] A letter of Dean Reed, which at trial he reaffirmed as being true in its entirety, Tr. I at 197-98, further emphasizes this point: "[Ewing's] grades were therefore achieved in competition with the small, highly-select Inteflex group in classes taught and graded at the Medical School or graduate level. Students are considered in good standing if a 2.0 grade point (C) average is maintained. His record, therefore, should not be compared with a standard undergraduate pre-medical transcript." J.A. at 117.

I on the first occasion, to have published medical research, J.A. at 105.

Finally, the District Court failed to apprehend that however one wishes to characterize Ewing's academic record—whether by Honors grades, research accomplishments, or fewest failures (grades of D or E)—it was nonetheless superior to those of nearly every other student allowed a retest. *See* J.A. at 105-11. Incredibly, one student (E2) permitted a retest had, proportionally, more than five *times* the number of deficiencies that Ewing had. J.A. at 108. Similarly, Inteflex student A3 had nine total academic deficiencies, or three times as many deficiencies as Ewing. J.A. at 111. These lapses in the District Court's *de novo* review of Ewing's record convincingly demonstrate why courts should not indulge in such reviews. "The federal judiciary should not adjudicate the soundness of a professor's grading system, nor make a factual determination of the fairness of the individual grades." *Keys* v. *Sawyer*, 353 F. Supp. 936, 940 (S.D. Tex. 1973). Similarly, a judgment for Regents should not be supported by judicially perceived academic shortcomings, especially when the testimony of the academicians themselves contradicts the District Court's view of Ewing's performance.

2. *The Sixth Circuit's Substantive Review of Ewing's Dismissal Was Appropriately Limited*

Despite Regents' charge that "[t]he Sixth Circuit conducted an impermissible *de novo* review of the University of Michigan Medical School's dismissal of Ewing," Pet. Brief at 17, the Court of Appeals was careful to avoid any such review. Yet, curiously, Regents complain elsewhere that the Sixth Circuit "never even addressed the numerous scholastic factors upon which the medical faculty's decision to dismiss respondent was largely based." Pet. for Cert. at 17. Aside from the erroneous suggestion that Ewing's dismissal was based on factors other than his single failure of the NBME examination, *see*,

e.g., J.A. 66, Regents appear here to have disregarded their own position, with which Ewing agrees, that courts should never evaluate scholastic factors because they are ill-equipped to do so. The Sixth Circuit quite properly realized it could not address *any* scholastic factors from a *de novo* perspective; it simply applied Regents' own rule regarding NBME retests to the Medical School's evaluation of Ewing's performance.

While it would not have been appropriate for the Sixth Circuit to engage in a *de novo* inquiry to determine whether Ewing was qualified to take the NBME Part I in the first place, the court properly relied on the undisputed trial record that Ewing was in fact a "qualified" medical student when he sat for this examination. Consequently, the contention of one of the amici that "the Court [of Appeals] substituted its judgment . . . for the medical faculty's" and "made its own judgment that Ewing was 'qualified' " is without merit. Brief of the American Council on Education et al. as Amici Curiae Supporting Petitioner at 4. The Sixth Circuit did not make its own judgment that Ewing a "qualified" student; rather, it simply observed that the academicians at trial had already made this determination: "Ewing was a 'qualified' student, *as the University defined that term*, at the time he sat for the NBME Part I." Pet. App. at 33a (citation omitted; emphasis added).

Significantly, the Court of Appeals buttressed its finding with a reference to Dean Reed's trial testimony, which is now reproduced at page 57 of the Joint Appendix. Dean Reed testified that Ewing was a "qualified" student, as that term is used in the Medical School publication "On Becoming a Doctor" (PX 3), when he took the NBME Part I. J.A. at 57. Similarly, Dr. La Du agreed that Ewing was "qualified to retake the exam." Tr. III at 181-82. Even Regents' own counsel represented to the District Court that Ewing was "qualified":

> THE COURT: Let me ask this so there is no question about it.

It is factual, is it not, that when Mr. Ewing took the NBME Part I Test, he was qualified to take it?

MR. DAVIS: That's correct.

J.A. at 62.

Regents having conceded that Ewing was "qualified" under the meaning of that term in the publication "On Becoming a Doctor," the Court of Appeals had only to consider the wording of the retest rule and, more importantly, the Medical School's own interpretation of it as revealed by past practice. The Sixth Circuit evidently found the rule's wording clear on its face: "Should a [qualified] student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." J.A. at 113. This sentence means what it says: if when a student takes the NBME Part I the first time he is "qualified" yet for some reason fails, then he is clearly entitled to a second chance to pass. Furthermore, the Medical School's undeviating practice of routinely giving every student at least two chances to pass this examination confirms beyond any doubt that the school itself had interpreted the rule this way. "In light of this undisputed evidence of a consistent pattern of conduct," observed the Court of Appeals, "the finding of the district court that there was not 'sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination,' [citation omitted], is clearly erroneous." Pet. App. at 32a-33a. Only with Ewing did the Medical School interpret its retest rule differently.[14]

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[14] Much is made by Regents and their amici of the allegedly decisional nature of granting NBME retests; however, none has brought any evidence to bear on this point. No testimony is cited in support; indeed, on the contrary, Dean Reed testified that such tests were "routinely" given. J.A. at 39. Regents nonetheless argue, "Student[s] were not 'routinely' given two chances to pass the NBME Part I; instead, the practice was that every student who failed the exam was brought before the appropriate faculty board, reviewed, and voted upon." Pet. for Cert. at 19 n.18(5). *See also* Pet. Brief at 28. Although the record does support that such students "*automatically*" (emphasis added) appeared on the Promotion Board's agenda, J.A. at 30, the record citation offered by Regents, J.A. 129-132, contains no discussion of students failing the NBME Part I on the first occasion, only discussion of students with course deficiencies.

F. The Record Demonstrates the Arbitrariness of Ewing's Dismissal

Perhaps the most startling aspect of this case is the relative ease with which Regents could have avoided it. If Regents had truly believed, as they now argue, that "[o]nly the most sanguine educator would expect respondent to pass the examination a second time if he were required to take it under normal conditions," Pet. Brief at 22, Regents could have simply allowed Ewing to retake the NBME Part I—as it did a classmate of Ewing, Inteflex student D2—at the very next administration of the examination. *See* J.A. at 111. Regents had been sufficiently "sanguine" to allow every other student who had ever failed this examination an opportunity for a retest, including students with many times more academic deficiencies than Ewing.

Indeed, the course pursued by Regents is itself suggestive of the arbitrariness of Ewing's dismissal. As Dr. La Du testified,

> [B]y not giving him a second chance . . . we are presuming that he would not be able to pass. . . . That presumption, to me, is in that sense very unfair to a student that's—that has the brightness and potential that Scott Ewing does. . . .
>
> I see no reason not to give him that opportunity, at least nothing that's come up is so decisive against him in other ways that makes me feel that this decision was the same as we would treat other medical students in equivalent academic difficulties.

Tr. III at 188-89. If the true reason for originally denying Ewing a retest was a fear that he would have passed, then Regents should have openly embraced this position

and explained at trial why such an outcome would be undesirable.

Perhaps to this end, Regents now rather belatedly attempt to inject a whole host of nonacademic reasons for Ewing's dismissal: "He received psychiatric counseling on several occasions," charge Regents, and "[h]e often beguiled his professors. . . ." Pet. for Cert. at 5. Yet these allegations—conspicuously unaccompanied by citations and omitted from their brief on the merits—pay decidedly short shrift to the record before this Court. At trial, Regents insisted that Ewing had been dismissed for a strictly academic reason, his failure of the NBME examination. J.A. at 57-58. Amicus American Association of University Professors suggests that "[r]esolution of the case would seem to turn in large part on the consistency and adequacy of the explanations offered by the institution for its dismissal of respondent Ewing." Brief of AAUP as Amicus Curiae at 16. If this Court finds the AAUP's "consistency and adequacy" formulation dispositive, Regents' ever changing theories cannot possibly carry the day.

A further analysis of the reasons offered by Regents for Ewing's dismissal is revealing. The Sixth Circuit found, "Because of his failure of the NBME Part I, Ewing was dismissed from the Inteflex Program." Pet. App. at 29a. Despite the clarity of the record on this point, *e.g.*, J.A. at 30, 39, 66, Regents persist in arguing that the Court of Appeals "ignored the district court's finding that he was dismissed on the basis of his entire academic record, and not solely because he failed the examination." Pet. Brief at 17. Yet Regents neglect to call attention to where this finding of the District Court is to be found; indeed, no such finding exists. On the contrary, the District Court found that Ewing had been dismissed because of his failure of the NBME Part I: "[Ewing's] score [on the examination] was not only the lowest score in his class, but the lowest score ever recorded by a University of Michigan student in the Part I examination. *Because* of this, on July 24, 1981,

the Promotion and Review Board voted unanimously to drop him from registration. . . ." Pet. App. at 15a (emphasis added). Although the District Court correctly concluded that Ewing was dismissed because of his NBME Part I failure, it erred in attributing any significance to the relative score. Regents conceded as much in their brief in the Court of Appeals: "The lowness of the score, however, was not the reason for his dismissal." J.A. at 26. Indeed, Dr. La Du testified that Ewing's score was "way below his real qualifications" and that, in any event, the lowness of the score was no justification for denying him an NBME retest. J.A. at 68.[15]

Significantly, Regents' changed position now fits nicely with this Court's admonition in *Horowitz* that "the determination whether to dismiss a student for academic reasons requires an expert evaluation of *cumulative* information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." 435 U.S. at 90 (emphasis added). Yet Regents' current view of cumulative shortcomings receives no support from the unambiguous testimony that had Ewing passed this examination he would not have been dismissed. J.A. at 40, 58, 80, 81.

A review of the reasons offered for Ewing's dismissal as recorded in the Medical School's own internal records at the time of his dismissal also proves instructive. *See* PX 19. These records reveal that "Promotion Board voted to drop Scott Ewing from registration on two accounts: (1) Failure of Natl. Board Exam Part I is considered a deficiency, after warning that no further deficiencies would be permissible." *Id.* at 5. And, "(2)

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[15] Although Regents claimed at trial that Ewing's score was the lowest in the Inteflex Program's brief history, J.A. at 47, this claim, even if it were true, is hardly equivalent to the District Court's finding that it was the lowest in the University's history. Moreover, Regents never offered any documentation to support this claim, choosing instead to rely on the memory of a single witness, Dean Reed, who was unable to remember even Ewing's own score of 235 correctly. J.A. at 47.

Failure to complete two years' work in 3 calendar years." *Id.* Dean Reed testified that the second reason, even if mistakenly relied on by the Board, was flatly wrong. Tr. II at 90-91. Ewing had completed the work within three calendar years. *Id.*[16]

In light of the untrustworthiness of the Promotion Board and Executive Committee minutes, *see infra* at 47-48, the handwritten comments in Plaintiff's Exhibit 19, made on the day of the original dismissal meeting, are instructive. First, it seems the Board acted, at least in part, on wrong information. Tr. II at 90-91. Second, Ewing was dismissed, as confirmed extensively by testimony at trial, because he failed the NBME Part I. Third, the Promotion and Review Board mistakenly thought Ewing was still on "warning" when he was not. This last issue merits fuller consideration.

1. *Ewing Was Not on Academic Warning or Probation When He Sat for the NBME Part I*

Regents' defense that Ewing was on "academic warning" seems little more than a convenient device born of this litigation. *See* J.A. at 40-42. At no time during Ewing's enrollment was the nebulous concept of academic warning embodied in any of the Medical School's written documents, J.A. at 40, nor was Ewing ever supplied any information describing the conditions that could lead to his being placed on warning. J.A. at 42. *See also* Tr. III

[16] Plaintiff's Exhibit 19 was excerpted from Ewing's official "docket" or student file, which was admitted in its entirety as Defendant's Exhibit 14. The incorrect statement about "[f]ailure to complete two years' work in 3 calendar years" was not the only erroneous information in Defendant's Exhibit 14; other concededly false information was included. *See* Brief of Plaintiff-Appellant in Court of Appeals at 41-44. Dean Reed attempted to blunt the untrustworthiness of Defendant's Exhibit 14 by conceding at trial his prior admission of several inaccuracies. "Several things in here were questioned at the deposition," testified Dean Reed, "and I agreed that there were inaccuracies at that time." Tr. II at 91. Yet earlier in his testimony Dean Reed had vouched for the accuracy of the information in Ewing's docket without qualification. *See* Tr. II at 86-104.

at 282-86. Indeed, Regents' academic warning policy did not become effective until the summer of 1982, J.A. at 41, better than a full year after Ewing's NBME Part I failure and subsequent dismissal.

Regents did, however, have an informal system of warning or probation during the time that Ewing was enrolled. Thus, as Regents stated in their petition for certiorari, "Three times he [Ewing] was placed on academic probation and warned that any further deficiencies could lead to his dismissal." Pet. for Cert. at 5. Each time, however, Ewing corrected whatever deficiency had led to his being warned and was accordingly removed from probation. J.A. at 81. In fact, each of Ewing's three deficiencies had been formally "removed" by the Promotion and Review Board. J.A. at 74. When Ewing sat for the NBME Part I in June 1981 he had no outstanding deficiencies, and any warning letters that had been previously issued had been removed by subsequent letters. J.A. at 81. As a result, Ewing was not on warning or probation at the time he took the NBME examination. J.A. at 80-81. *See also* J.A. at 42-43, 57. Regents nonetheless assert, "Ewing sat for the NBME Part I examination in June of 1981, while on warning. J.A. at 41, 57." Pet. Brief at 10. Regents' citations do not support their contention.

Regents next attempt to distinguish Ewing from the other students permitted NBME retests by arguing, "among the eight Inteflex students who failed the NBME Part I on the first occasion, Ewing was only one of two who were on academic warning." Pet. Brief at 45.[17] Regents claim that this other student who was on

[17] Regents, however, represented to the Court of Appeals, "He [Ewing] was the only student in the history of the Inteflex Program to fail the NBME Part I examination while on academic warning." Brief for Defendant-Appellee at 23. Regents' penchant for changing positions, as was noted earlier, speaks directly to the American Association of University Professors' "consistency and adequacy" formulation.

warning "suffered an epileptic seizure during the examination," Pet. Brief at 45, and offer in support testimony given by Dean Reed during his deposition. Dean Reed actually testified that "[t]he individual had a medical illness which for some very complicated family reasons she could not recognize that were very acute right prior to the [National] Board examination," Reed Dep. at 168, not that the individual had suffered any illness during the examination, let alone a seizure.

Still more important, this student's treatment confirms that Regents' NBME retest rule applied even to those students who were on academic warning at the time of the examination. This student's medical excuse related to the student's second NBME attempt and therefore won the individual a *third* chance at passing, not a second as Regents imply.[18] Thus, even if Ewing had been on warning, as Regents contend, this should not have justified Regents' disregarding their routine practice of giving every student two chances to pass the NBME Part I.

As for the warning letters Regents now choose to rely on (DX 17, 18, and 19; *see* Pet. for Cert. at 5 n. 4), even the most recent one, Defendant's Exhibit 19, which was issued on July 30, 1980, J.A. at 146, predates by some six months another letter sent to Ewing removing him from warning. J.A. at 115. This more recent letter, Plaintiff's Exhibit 9, sent on January 26, 1981, specifically informed Ewing of "the removal of your . . . deficiency." J.A. at 115. Moreover, the warning given to Ewing in Defendant's Exhibit 19, J.A. at 146, was not reiterated. Dr. Friedman, in fact, conceded at trial that Plaintiff's Exhibit 9 conveys that the previously issued

[18] Dean Reed testified as follows:

> Q: So that's what I was asking, even though the student was on warning and failed the NBME part one a second time, the student was given a third test?
>
> A: Yes.

Reed Deposition at 166. *See also* Tr. I at 82.

warning was no longer in effect and that Ewing was thus removed from warning. J.A. at 80-81.

Contrary to concepts of fundamental fairness, Regents admitted that Ewing's three prior deficiencies—which had been removed by formal action of the Board, J.A. at 42-43, 74—were still being held against him by certain Promotion and Review Board members. Tr. III at 253-54. No one, however, bothered to inform Ewing of this. *Id.* Even if this Court takes the view that such an action is excusable as an appropriate exercise of educational discretion, and that, in Regents' words, Ewing was actually dismissed for "multiple academic deficiencies," Pet. Brief at 16,[19] it would nonetheless remain inexplicable why many students with records far worse than Ewing's were not also dismissed after failing the NBME Part I once. Yet not even one was. *See* J.A. at 107-111. The only plausible explanation for why all of these students were allowed to retake the examination is Regents' NBME retest rule. All of the students listed in Plaintiff's Exhibit 1, J.A. at 107-111, were, by removing whatever prior deficiencies they had incurred, considered qualified by Regents to take the NBME Part I. Having thus been found qualified to take the examination, each was entitled to a second opportunity to pass before being subject to dismissal. Only with Ewing was this practice not followed.

Elsewhere, Regents argue, "Nineteen other Inteflex students, many of whom had better records than respond-

[19] By Regents' own definition at trial, Ewing had a total of three academic deficiencies, Tr. I at 168, which he successfully removed before he took the NBME Part I. J.A. at 57, 81. Regents nonetheless state, "Ewing failed the final examination in Pharmacology when he first took it but was allowed a retest and was not given a fourth deficiency, which could have led to his dismissal from Medical School. J.A. 128, 139; Tr. III at 166-68." Pet. Brief at 9. Ewing did in fact fail the final examination in Pharmacology and he removed the deficiency by passing a retest, Tr. I at 171-72; however, contrary to Regents' assertion, Ewing was given a deficiency in this course, and that deficiency was his *third*, Tr. I at 171, not his fourth.

ent's, were dismissed by the faculty without ever having taken the NBME Part I." Pet. for Cert. at 19 n. 18(4). *See also* Pet. Brief at 45. The source for this claim is Defendant's Exhibit 52. J.A. at 165-66. However, this exhibit lists only anecdotal "[c]ircumstances" for students being dropped. As a result, it is not possible to tell that *any* of these students had better records than Ewing's, let alone "many" of them as Regents suggest. Even more significant, every one of these students was dismissed at an early stage in his Inteflex career, and thus never even approached the point at which students take the NBME Part I. J.A. at 66. Ewing in contrast was deemed qualified by Regents to sit for the NBME. J.A. at 57. Because these other 19 students were never considered qualified by Regents to take the NBME Part I, their treatment cannot possibly be relevant.

2. *Ewing Is Fit to Pursue His Medical Studies*

Regents argue, "It is particularly appropriate to presume the validity of the medical faculty's judgment here, since it intimately concerns whether Ewing himself should be allowed the opportunity to become a medical professional." Pet. Brief at 28. Such an argument is especially unfair to Ewing. As Regents' counsel was informed, Ewing matriculated as a first-year student at another fully accredited, four-year American medical school in the fall of 1984. It simply is misleading to suggest that this Court's decision "intimately concerns whether Ewing himself should be allowed the opportunity to become a medical professional." It does not. Ewing will have that opportunity irrespective of this Court's decision and should not be stigmatized in his future professional career, in postgraduate residencies and beyond by Regents' sweeping and baseless accusations. The outcome here will only affect whether Ewing will have the option of returning to Michigan for his degree.

Furthermore, the record demonstrates that Ewing is fit to be a physician. Dean Reed expressly testified that Ewing is not unfit to be a doctor because of any problem with his "attitude, personality or moral character," J.A.

at 46, and that Ewing clearly has the intellectual ability to be a doctor. *Id.* He further affirmed that Ewing's dismissal was not "because of unethical or dishonest behavior, nor were his intellectual capabilities in question." Tr. I at 198. *See also* J.A. at 118. Finally, Dean Reed testified that Ewing had *always* behaved in a manner befitting a medical student and future physician. J.A. at 44. This constitutes direct, primary evidence from the very individual recognized as the best possible source: Dean Reed. By his own admission, he knew more about Ewing's record than anybody on the Medical School faculty. Tr. I at 214.[20]

G. Regents' View of *Horowitz* as a Wholesale Invitation to Schools to Disregard Their Own Rules Is Erroneous

Regents contend, "The Sixth Circuit's decision . . . assumes that the University's single failure to follow its own 'rule' amounts to a constitutional violation. Yet, in *Horowitz* this Court implied the very opposite was true.

---

[20] No one testified that Ewing was unfit to be a physician. Dr. Friedman, who testified that Ewing is "a remarkable young man" with "certain abilities [that] are very impressive," J.A. at 79, nonetheless also expressed the opinion that "I think he has certain qualities which will militate against him being a good physician." J.A. at 79. However, on cross-examination, Dr. Friedman admitted that the "qualities" he finds undesirable in Ewing are strictly personal and did not contribute to the decision to dismiss Ewing. Tr. III at 278. A similar observation may be made about Dr. Menon's testimony. *See* J.A. at 70. Yet Dean Reed testified that Ewing was not dismissed for "psychological, personality, moral, [or] attitudinal" problems. J.A. at 57-58. *See also* J.A. at 46. More to the point, other faculty members praised Ewing's ability and performance. *See* DX 12, 13. For example, Terrence C. Davies, M.D., Chairman of the Department of Family Practice, wrote that "[u]ndoubtedly, Mr. Ewing has superior natural intelligence and ability," Tr. III at 211, and Professor of Physiology Arthur J. Vander, M.D., characterized Ewing as an "excellent, interested student." Tr. III at 212. But surely courts cannot be in the business of weighing one professor's opinion against another's. Consequently, Regents cannot now justify their dismissal on reasons disclaimed by Dean Reed. *See* Tr. III at 289 ("[t]he only person who speaks for the Promotion Board is Dr. Reed").

435 U.S. at 92, n.8." Pet. Brief at 44. This view in part derives from a misunderstanding of the Sixth Circuit's analysis of Ewing's property interest. As has already been stated, Ewing does not suggest that a state university's failure to follow its own rule amounts to a *per se* constitutional violation. *See Winnick* v. *Manning*, 460 F.2d 545, 550 n.6 (2d Cir. 1972). It is only when an individual is arbitrarily deprived of a state-recognized property interest or a liberty interest that constitutional protections are properly called into play.

Ewing disagrees, however, with Regents and their amici when they suggest that a university's violation of its own rule can never state a valid cause of action. Regents' liberal exegesis of *Horowitz* seems to read too much into this Court's language that it "disagree[d] with both respondent's factual and legal contentions." 435 U.S. at 92 n.8. Regents' view ignores the context; this Court had found that "the record clearly shows that the school followed its established rules, except where new rules had to be designed in an effort to further protect respondent. . . ." *Id.* Thus, the University of Missouri clearly complied with its own rules. The same, however, can hardly be said for Regents.

Contrary to Regents' suggestion, requiring a university to adhere to its rules will not result in the "application of wooden standards," Pet. Brief at 33, nor will it "diminish their faculties' ability to give individualized attention to marginal students" or "students from educationally disadvantaged backgrounds." Pet. Brief at 32. Universities will still have the discretion to provide extra opportunities to students who might need them, as indeed Regents have for several students. For example, Regents have seen fit to allow some students three chances to pass the NBME Part I, though not others, and in one case determined four chances to be appropriate. The point is that, before Ewing, Regents' exercise of such educational discretion had never come into play until after the second NBME failure. The second test was always "routinely" given. J.A. at 39.

Requiring educational institutions to adhere to their own publicly promulgated, preexisting rules helps assure that the assertive student and others thought undesirable will not be discharged under the pretext of an academic dismissal. Most schools will not find it burdensome to follow rules of their own devising. Presumably, when a school sets forth a rule and establishes a practice, it does so for good reasons. Yet Regents here have not claimed to revoke or revise their retest rule. Nor, for that matter, have they attempted to explain Ewing's dismissal as a change in their testing policy. In fact, on the contrary, after they dismissed Ewing, Regents increased from two to three the number of opportunities afforded every student to pass the NBME Part I. J.A. at 73.

The Supreme Court of Illinois has observed, "A medical school is an institution so important to life in society that its conduct cannot be justified by merely stating that one who does not wish to deal with it on its own terms may simply refrain from dealing with it at all." *Steinberg* v. *Chicago Medical School*, 69 Ill. 2d 320, 332 (1977). Surely, it is not excessive to suggest that when one does wish to deal with a medical school on the school's own terms, as Ewing does here, the school ought to abide by those terms. To do so would still permit Regents to override their academic rule regarding NBME retests for cogent nonacademic reasons "like cheating." Tr. III at 182.

H. The Significance of the University Publication "On Becoming a Doctor"

The publication "On Becoming a Doctor", J.A. 113, was "distributed on the campus of the University of Michigan about a week or so prior to the NBME Part I Examination, in which Mr. Ewing took and failed the test." J.A. at 40.[21] It was paid for by University funds, Tr.

[21] Regents represented to the Court of Appeals, "The publication did not even exist when plaintiff was first admitted to Medical School and was first published and circulated *after* plaintiff took

I at 160, widely distributed to a large number of people by mail, Tr. I at 161-62, and made available to the public in the Dean's office. Tr. I at 162. The publication itself expressly states that "[c]opies are made available without charge to Medical Center alumni, faculty, students, staff and friends." J.A. at 114. The Sixth Circuit found, "This University publication is important because . . . [it] memorialized the consistent practice of the medical school with respect to students who initially fail that examination [the NBME Part I]." Pet. App. at 33a.

Regents endeavor to minimize the Sixth Circuit's finding by arguing that the pamphlet "referred to qualified standard students and not [to] unqualified standard or Inteflex students (J.A. 82). . . ." Pet. Brief at 40-41. The citation offered by Regents refers to Assistant Dean Gibson's testimony; the Assistant Dean claimed to have been "thinking about" Standard students and not Inteflex students when he prepared this statement. However, the text, J.A. at 113-14, makes no reference to Standard students, only to "medical students" in general. Associate Dean James A. Taren, M.D., testified that Inteflex students are officially considered medical students when they enter the third year of the Program, J.A. at 33-34, and that Ewing was considered a medical student. J.A. at 35. Moreover, whatever Assistant Dean Gibson may have been "thinking about" when he prepared this printed statement is immaterial to any legal considerations here. *See Steinberg* v. *Chicago Medical School*, 69 Ill.2d 320, 331 (1977).

Regents' flawed attempt at rebuttal also ignores that the Director of the Inteflex Program, Dean Reed, made clear in his testimony that the NBME retest policy promulgated in "On Becoming a Doctor" (PX 3) does apply

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the NBME examination. . . ." Brief for Defendant-Appellee at 13 (citing Tr. III at 301; emphasis in original). The citation offered by Regents contains no mention of the publication date and this position appears to be abandoned here.

to Inteflex students and that Ewing was a "qualified medical student," as that term is used in the document, when he sat for the NBME Part I. J.A. at 57. Finally, Regents' assertion that this publication "was known by Ewing to be inapplicable to him," Pet. Brief at 41 (citing "J.A. 60"), is devoid of foundation. Ewing must again urge this Court to check Regents' citation; it is not supportive.

I. Regents Rely Excessively on Evidence Not Properly Before This Court

Regents make repeated reference in their brief to documentary evidence the admissibility of which Ewing expressly challenged in the Court of Appeals. Defendant's Exhibits 10, 14, 50, and 51 were all admitted over Ewing's objections. Brief of Plaintiff-Appellant at 36-46; Reply Brief at 27-30. Since the court did not need to reach the admissibility of these exhibits, and if this challenged evidence is now regarded as somehow determinative, Regents are in effect asking this Court to decide that the exhibits were properly received. Understandably, this Court has been reluctant to base a decision on matters which courts of appeals have not first addressed. *Cf. J. Truett Payne Co.* v. *Chrysler Motor Corp.*, 451 U.S. 557, 568 (1981). Nonetheless, Regents have seen fit to reproduce extensive excerpts from these exhibits, J.A. at 134-42, 153-64, and base many of their arguments on them. Pet. Brief at 4, 6-11, 13-15. Defendant's Exhibits 10, 50, and 51 consist of minutes of the Promotion Board and Executive Committee that were shown at trial to be unreliable and prepared in anticipation of litigation. Tr. I 97-99, 208-11. *See also* footnote 16, *supra* (Defendant's Exhibit 14 untrustworthy).

If considered by this Court, special scrutiny is required of Defendant's Exhibit 10, since Regents persist in using an excerpt to support their contention that Ewing was aware that he would be dropped from registration for failing the NBME Part I on a single occasion, Pet. Brief

at 13-14, and because the District Court obviously relied so heavily on these minutes. (The District Court, for example, quoted from the minutes extensively in its opinion and even italicized for emphasis the remarks both Ewing and Dr. Friedman disavowed at trial. Pet. App. at 18a-20a. *See* J.A. at 60-61, 81).

Regents argue that Ewing "had been fully aware . . . when he took the NBME [Part I] . . . that if he failed he could be dropped from registration. J.A. 141-142." Pet. Brief at 14. Then, in a footnote, Regents suggest that this version of the exchange between Ewing and Dr. Friedman at the Promotion Board's July 31, 1981, meeting is preferable to the trial testimony because "[t]he testimony of both Dr. Friedman and Ewing himself as to what Ewing believed *would* happen in no way establishes what Ewing knew *could* happen." Pet. Brief at 14 n.6 (emphasis in original). Yet, ironically, these minutes do not support Regents' contention since J.A. 141-42 also uses the word "would," not "could" as Regents imply.

To establish the unreliability of these minutes, Dr. Friedman was questioned at trial as follows:

> Q: Dr. Friedman, Scott Ewing did not say, [at] that Promotion Board meeting, that he knew a single failure [of the NBME Part I] would result in his dismissal, did he?
>
> A: I didn't think he used those words, no.

J. A. at 81. Moreover, to preclude an argument of the very sort Regents now raise, Dr. Friedman was questioned further:

> Q: *And he didn't say words to the effect, either,* that a single failure would rule in his dismissal? [emphasis added]
>
> A: I don't think he made that phrase, no.

Id. Given the imprecise nature of the spoken word, surely "would" and "could" qualify as "words to the [same] effect."

J. Limited Substantive Due Process Review Will Not Endanger Academic Freedom

Regents suggest that if universities are required to follow their own publicly promulgated rules or are held legally accountable for their actions to even the most minimal degree, "Faculty members, such as those in the present case, might well choose to forego academic life altogether," Pet. Brief at 32, and "our national dedication to safeguarding academic freedom" might ultimately be jeopardized. Pet. Brief at 26 (citations omitted). Surely these claims, however well intended, are excessive. Yet it is on this basis that Regents and their amici ask this Court to place universities and their officials above the law. Apparently, universities should be entitled to act arbitrarily and capriciously with impunity. "[J]udges should never reverse procedurally correct academic decisions," contend Regents, "*even if they are 'dead wrong' substantively.*" Pet. Brief at 47 (emphasis added). The District Court expressed a similar notion of "academic freedom":

> [E]ven if the faculty does not make the right decision, even if the faculty makes to us what would appear to be, obviously, a wrong decision where it is in the field of academic decisionmaking, there, we have to allow the faculty to make that decision. The courts cannot intrude even if it's dead wrong.

J. A. at 93. The District Court further implied that this Court's *Horowitz* opinion could be reasonably read as meaning:

> [U]nder all circumstances, no matter how wrong, if it's in the academic area and a faculty decides against a student, *that's tough, but we'll support academia willy-nilly. . . .*

Id. (emphasis added). This Court should not endorse such a reading. Although Ewing strongly believes judicial restraint is especially called for in academic matters, and that courts have no business engaging in *de novo* reviews of students' academic records, the highly limited

substantive review conducted here by the Sixth Circuit will not burden universities nor place at risk academic freedom. Indeed, if anything, wholesale unaccountability of the sort Regents desire would, in the end, only diminish academic freedom.

Students and their families nowadays invest tens of thousands of dollars in undergraduate and professional education, and expend in years and effort a sum of far greater importance. If a student is dismissed arbitrarily and capriciously, if his dismissal is "dead wrong," it will simply not do for our nation's judiciary to reply "that's tough." J.A. at 93.

CONCLUSION

For the foregoing reasons, Respondent Scott E. Ewing respectfully requests that the judgment of the Court of Appeals for the Sixth Circuit be affirmed. In the event this Court reverses on Count I, Ewing asks that Counts II and IV be remanded for consideration by the Court of Appeals.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,
v.
SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. RESPONDENT IN FACT CONTENDS FOR THE SUBSTANTIVE REVIEW OF ACADEMIC DECISIONS THAT HIS BRIEF ACKNOWLEDGES TO BE IMPROPER.

Respondent now contends that the only issue presented is whether the University has acted arbitrarily and capriciously by failing to follow a supposed "rule" requiring retests for all students who fail the NBME Part I examination. Res. Brief 8-9, 32-34. He pretends to deplore judicial review of the merits of academic decisions and commends the court of appeals' "appropriately limited" substantive review. *Id.* at 32. These arguments ignore the undisputed facts and try to flee—unsuccessfully—from the court of appeals' unprecedented intrusion into academic decisionmaking. Pet. App. 33a.

A. Ewing Had Specific Notice that Failure of the NBME Would be Grounds for Dismissal.

The record is clear on the events surrounding Ewing's failure of the NBME examination. He had received a written warning that any future deficiency would be grounds for his dismissal from the medical school. J.A. 146. Failure of the examination was itself regarded as such a "deficiency." J.A. 72 and 128. Ewing himself conceded that when he took the test he knew it was "critical" to his future at the school. J.A. 141-142. After he failed the examination, the faculty concluded that Ewing had been given many opportunities to overcome his record of substandard performance and that the terms of the warning should be enforced. J.A. 137-142.

Respondent tries to avoid these critical facts by misstating or confusing them. He says that, since he rectified the deficiency that had placed him on warning, he somehow earned the right to accumulate new deficiencies in the future. Res. Brief at 38-42. The fact of the matter is that Ewing's cure of the past deficiency only permitted him to remain as a student. He continued to be subject to dismissal for future deficiencies. His failure of the NBME was such a deficiency. J.A. 72.

B. Only the Faculty Could Properly Determine Whether Ewing Was "Qualified" to take a Retest.

Respondent also tries to side step the facts of his warning by first confusing "deficiency" with "warning" and by then arguing that when the deficiency referred to in the warning letter of July 30, 1980 (J.A. 146), was removed by the letter of January 26, 1981 (J.A. 115), he was no longer under warning and was therefore "qualified" to take the retest under a supposed "rule" entitling all students to such an opportunity, regardless of their individual circumstances. Res. Brief at 33 and 42. This alleged "rule" forms the basis for Ewing's contention

that the court of appeals merely applied a clear principle of law without interfering with academic decisionmaking. *Id.* at 9-10, 32-33 and 49. Ewing's argument suffers from four fatal flaws.

First, the court of appeals did not purport to rest its decision on the existence of any "rule" such as respondent describes. On the contrary, the court of appeals found that the University acted arbitrarily because the court discerned a "consistent practice" of allowing retests and that Ewing was the only student denied a retest during the 1975-81 period. Pet. App. 33a.

Second, the critical link in respondent's argument (and the court of appeals' decision) is a comparison of Ewing's performance with the academic records of other medical students. While Ewing disclaims any intention to second-guess academic judgments in one part of his brief (Res. Brief at 33), he argues elsewhere that he was at least as, if not more, qualified to take a retest than other students who were granted the opportunity. Res. Brief at 7-8, 32, 41. To bolster this argument, Ewing goes so far as to call to the Court's attention to his present enrollment in "another fully accredited, four-year American medical school" and argues that this is further evidence of his fitness. Res. Brief at 42. All this proves is that different institutions have different admission standards and different academic standards.[1] Petitioner continues to believe that Ewing is not qualified to pursue a University of Michigan medical degree, despite his apparent success at other studies elsewhere. These arguments are incompatible with the individualized and frequently subjective judgments that must be made in assessing academic performance and

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[1] Having opened the door on this point, such statement in Ewing's brief should be clarified with the explanation that he is currently attending the Chicago College of Osteopathic Medicine, where the NBME examination has never been required for advancement and ultimate graduation with the D.O. degree. *See* PX 4 at pp. 6-7. (NBME examination administered exclusively in schools with M.D. programs).

judging a student's competence to be a physician. *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978). There could scarcely be a more intrusive and disruptive form of judicial interference with academic judgments than inferring "rules" governing academic standards from a comparison of many students' academic records. Such judicial entanglement in academic decisionmaking is not only unprecedented, but invites widespread litigation in which courts would be asked to hold that the lowest academic performance tolerated in the past should be a legally-enforceable standard of attainment for the future.

Third, both respondent and the court of appeals entirely ignore the painstaking and comprehensive review of Ewing's record, which resulted in the faculty's decision not to permit him to continue in the medical school. Pet. App. 13a-20a. There could hardly be a clearer instance than this of a good faith, academic judgment. Respondent has conceded (as he must) that any right to take a retest is restricted to "qualified" students (J.A. 59-60); yet he argues here that the medical faculty was not free to consider his past record, his probationary warning and his failure of the NBME test in assessing whether Ewing was "qualified." Even if there were a "rule" [2] granting

[2] Respondent's brief begins by referring to retests on the NBME Part I examination as a "consistent past practice" (*id.* at 2) when in fact Dean Reed, the one person Ewing agrees to have been more familiar with the Inteflex Program than any other faculty member (*id.* at 4, n. 5, 6, 7 and 25, n. 11) had testified that it was "the common practice" for promotion and review boards to allow a retest after reviewing a student's academic record. J.A. 40. Ewing takes considerable literary license with Dr. Reed's testimony in subsequently referring to this "common practice" as the medical school's "established policy" (Res. Brief at 5), and "unbroken policy and practice" (*id.*), and then elevating it to "a written rule" (*id.* at 9), and thereafter referring to it in respondent's brief as a "rule" rather than a practice. Query, when does a practice become a rule? After five students are allowed a retest? After ten? After fifty?

retests to "qualified" students, it is indeed an extraordinary interference with academic decisionmaking to deny a medical faculty any room to exercise judgment or discretion in implementing the rule and determining who is "qualified."

Fourth, respondent builds much of his argument on the erroneous premise that many courts have endorsed an "arbitrary and capricious" standard of substantive judicial review of academic decisions. Res. Brief at 18-20. The argument is based on a semantic confusion. Many cases observe that universities may not "arbitrarily" or "capriciously" dismiss students; [3] but no reported case of which we are aware holds that a court may apply an "arbitrary and capricious" *standard of review of academic factors* to determine the soundness of a decision made on academic grounds.[4] These cases instead view "arbitrary" academic decisions consistently with the substantive standard of review endorsed in *Youngberg* v. *Romeo*, 457 U.S. 307, 322-23 (1982), under which courts must refrain from intruding into professional decisionmaking unless there is evidence that such decisions are really based on improper, nonprofessional and extraneous considerations. No such issue is presented by the purely academic decision made by the University of Michigan's medical school faculty.

[3] *See*, for example, the cases cited at pages 17-19 of Respondent's Brief.

[4] Indeed, "[s]ince standards of 'irrationality' or 'arbitrariness' vary from time to time and from judge to judge, applications of the concept—indeed, the concept itself—have generated serious criticism of the judiciary and the judicial function." *Jeffries* v. *Turkey Run Consolidated School District*, 492 F.2d 1, 4 (7th Cir. 1974) (footnote omitted; discussing § 1983 substantive due process rights of dismissed public school teacher).

II. THE LOWER COURT'S ORDER VIOLATES THE ELEVENTH AMENDMENT BECAUSE IT SEEKS TO COMPEL THE REGENTS TO COMPLY WITH STATE LAW.

If this Court should somehow conclude that there *was* such a rule as the one for which respondent contends, then the Sixth Circuit's order constitutes an order by a federal court compelling state officials to conform their conduct to state law. "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89, 79 L. Ed. 2d 67, 82 (1984).

CONCLUSION

Based upon the foregoing argument and authorities, the judgment of the Court of Appeals should be reversed.

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OCTOBER TERM, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,
v.
SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AND THE FEDERATION OF STATE MEDICAL BOARDS AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether constitutional guarantees of due process require federal courts to conduct a *de novo* substantive review of a state university medical faculty's decision to dismiss a medical student for academic deficiencies when there is no genuine issue of procedural unfairness or unlawful motivation.

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BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AND THE FEDERATION OF STATE MEDICAL BOARDS AS AMICI CURIAE SUPPORTING PETITIONER

This brief is filed on behalf of the American Council on Education, the Association of American Medical Colleges and the Federation of State Medical Boards in support of the petitioner. Consent to file this brief has been obtained from counsel for the parties and has been filed with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

The American Council on Education (the "Council") is one of the nation's oldest and most active educational associations. Founded in 1918 to advance higher educa-

tion, its membership includes over 1400 colleges and universities and 145 higher education organizations across the United States. As a national leader in higher education policymaking, the Council attempts to promote and preserve the interests of all who compose the academic community—students, faculty and administrators.

The Association of American Medical Colleges (the "Association") is a nonprofit corporation organized under the laws of the State of Illinois and having its principal place of business in the District of Columbia. Founded in 1876, the Association is a membership organization composed of all 127 accredited and operating nonprofit medical schools in the United States, over 436 teaching hospitals in which medical students receive their clinical education, and 76 academic and professional societies, with an aggregate membership of over 100,000 physicians and scholars, the members of which are actively engaged in medical education, biomedical research and the provision of patient care. The Association is actively involved in assuring the quality of medical education both directly through its own activities and through its sponsorship and support of agencies involved in accrediting programs in medical education: the Liaison Committee on Medical Education (programs leading to the M.D. degree), the Accreditation Council for Graduate Medical Education (post-graduate programs leading to certification in medical and surgical specialties), and the Accreditation Council for Continuing Medical Education (continuing education programs for practicing physicians). In addition, the Association is a founding member of the National Board of Medical Examiners and the Educational Council on Foreign Medical Graduates. Thus, the Association is deeply interested in the preservation of the proper role and authority of the medical school faculties through the duly constituted academic processes in the certification of achievement and competence reflected in the award of the M.D. degree.

The Federation of State Medical Boards (the "Federation") was founded in 1912 and includes as members the medical licensure boards of all 50 states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. It includes 10 of the 16 osteopathic licensing boards, and as affiliate members, 10 Canadian provincial licensing boards. It is a member of the National Board of Medical Examiners, the Educational Council on Foreign Medical Graduates, the Accreditation Council for Graduate Medical Education, and the National Board of Medical Specialties. The Federation's member medical boards regard a validly awarded M.D. degree as the fundamental, though not the only, prerequisite for the award of medical licensure. Any decision which would deprive medical faculties of their proper role in the award of the M.D. degree would undermine the degree's integrity and value for licensure purposes.

The Council, Association and Federation appear as *amici curiae* to oppose the Court of Appeals' unjustifiable interference with the good-faith efforts of the University of Michigan's medical faculty to prescribe academic standards and assess the academic qualifications of its students.

SUMMARY OF ARGUMENT

Petitioner Scott Ewing failed the comprehensive National Board of Medical Examiners (NBME) Part I examination, which University of Michigan medical students must pass before they may treat patients during the clinical phase of their training. Ewing had previously received many unfavorable evaluations of his academic performance and was on notice that further deficiencies would be grounds for dismissal when he took the test. More than twenty faculty members spent hundreds of hours counseling him and reconsidering his case before the responsible faculty committee decided that he should not continue in the program. The committee's conclusion

was supported by ample basis for judging, from Ewing's erratic performance as a medical student, that he was unsuited to become a physician.

Ewing does not challenge the fairness or adequacy of the procedures leading up to his dismissal. There is no evidence or allegation that the medical faculty's judgment was based on any ill will or unlawful motivation, or that it reflected anything less than an honest and careful evaluation of Ewing's performance and competence to be a physician.

The Court of Appeals nevertheless conducted a *de novo* reexamination of the academic issues and held that the decision to dismiss Ewing was "arbitrary and capricious." It concluded that, since other University of Michigan medical students had been permitted to retake the test, Ewing should be given the same chance. (742 F.2d at 915.) And it made its own judgment that Ewing was "qualified" under the University's standards to take the test again. (*Id.* at 916.) In so ruling, the Court substituted its judgment of appropriate academic standards for the medical faculty's; it effectively directed the University to assess academic performance under court-imposed standardized guidelines rather than through individual case-by-case evaluation of each student's past achievement and future promise.

The decision below ignores the longstanding judicial policy of deferring to academic decisions. It threatens the freedom of schools and faculties to formulate and apply academic standards. If the decision is sustained, every academic suspension or dismissal of a state university student is potentially a federal case, open to *de novo* evidentiary reexamination by United States district courts under 42 U.S.C. § 1983, no matter how fair the university's procedures and honest its evaluations. The mere threat of such litigation would disrupt public universities' ability, and infringe their freedom, to establish and uphold academic standards. It would demoralize their

faculties. Limited financial and teaching resources would be committed to avoiding litigation and defending it, rather than to educating students.

In Section 1983 cases involving public universities, federal courts can and should entertain complaints posing genuine issues that academic dismissals have been tainted by unfair procedures, unlawful discrimination, or retaliation against the exercise of protected freedoms. But there is no constitutional or statutory predicate for substantive reexamination by the federal courts of the merits of a university's academic decisions under an "arbitrary and capricious" or other standard. Once a court finds that a "professional [academic] judgment was in fact exercised," it should not inquire further into the correctness of the judgment. *See Youngberg* v. *Romeo*, 457 U.S. 307, 321 (1982). Universities and their faculties should be able to make good-faith academic judgments, under careful and deliberate procedures, free from the fear and burdens of judicial intervention.

ARGUMENT

I. The Court of Appeals Improperly Overrode the Medical Faculty's Careful and Deliberate Academic Judgment.

The *amici* and their members are committed to the principle that academic suspension or dismissal decisions should be made in accordance with procedures that are fair, careful and deliberate. The values of the academic community cannot flourish where academic standards are compromised by malice, unlawful discrimination, unfair procedures or efforts to punish the exercise of constitutionally protected freedoms of expression. In those rare cases where academic decisions may be tainted by such flaws, and schools provide no remedy, the courts should be available under 42 U.S.C. § 1983 or other appropriate jurisdictional bases to afford redress.

But the values of the academic community can also be undermined by needless, ill-considered judicial interfer-

ence with academic decisions. Precisely that danger is posed by decisions like that of the court below. In applying an "arbitrary and capricious" standard of review to academic decisionmaking, the court of appeals overrode a conscientious academic judgment of the University's medical faculty that was reached in a fair, "careful and deliberate" manner. *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78, 85 (1978).

A. *The Court of Appeals Ignored the Longstanding Judicial Policy Requiring Deference to the Academic Decisions of Colleges and Universities.*

The court of appeals did not even pay lip service to the principle that the judiciary will not substitute its judgment for that of colleges and universities in academic matters. Although the district court conducted a trial *de novo*—improperly, in our view (*see* pp. 16-21, *infra*)—it ultimately reached the correct conclusion that the case presented no issue within the competence of courts:

> "I am not permitted to review the ultimate academic qualification decision which has been made in a 'careful and deliberate' manner, *Horowitz*, 435 U.S. at 85, and not influenced by ill will or ulterior purposes .... This type of limited review represents the only practical and workable judicial approach to academic qualification decision-making .... [I]t is for prudential as well as pragmatic reasons that the propriety of academic decisions cannot be reviewed." 559 F. Supp. at 799.

In reversing, the court of appeals found no lack of "careful and deliberate" decisionmaking, no procedural unfairness, no unlawful discrimination, nor any "ill will or ulterior purposes." Instead the court held that the medical faculty's decision was "arbitrary and capricious" because it denied Ewing another chance to take the NMBE Part I test, while retests were given to the other students who had failed during the period 1975-82. (742 F.2d at 916). The court of appeals did not explain the balancing process by which the grant of retests to different students outweighed Ewing's undisputed personal deficiencies:

- Ewing's prior academic record was replete with academic deficiencies, irregular progress and "last chances" (559 F. Supp. at 793-95);
- Ewing was on notice that further deficiencies would be cause for dismissal at the time he took the NMBE test (J.A. 145-46);
- The district court found that Ewing's grade on the NMBE Part I test was the lowest in the University's history (559 F. Supp. at 794);
- Ewing's case received elaborate, individualized consideration by the medical faculty's Promotion and Review Committee, and was unanimously upheld on appeal to the Executive Committee, in proceedings in which Ewing participated personally (559 F. Supp. at 794-96);
- A number of other students had been dismissed from the medical school before having the chance to take the test even a first time (J.A. 66, 165).

The court of appeals unquestionably rendered an *academic* judgment. It concluded that the medical faculty should have given greater—indeed, determinative—weight to the "precedents" established by the cases of other students, and disregarded Ewing's individual record and attributes. In this fashion, the court of appeals imposed decisionmaking rules characteristic of administrative agencies upon the very different process of prescribing and upholding academic standards for persons who aspire to be physicians.

We are unaware of any precedent for the court of appeals' substitution of its judgment for the medical faculty's. This Court's recent decision in *Board of Curators* v. *Horowitz*, *supra*, 435 U.S. at 92—another medical

school dismissal case arising under 42 U.S.C. § 1983—stressed that "[c]ourts are particularly ill-equipped to evaluate academic performance" and specifically admonished that neither procedural due process claims nor an "arbitrary and capricious" review standard should be misused as a means of "judicial intrusion into academic decisionmaking." [1]

Lower federal courts, too, both before and after *Horowitz*, have been faithful to the principle that courts do not sit to review the good-faith *academic* decisions of colleges and universities. One of the cases most frequently cited is *Connelly* v. *University of Vermont*, 244 F. Supp. 156 (D. Vt. 1965), which collected and analyzed numerous (mostly private college) cases. It discerned from them the longstanding rule that courts should strictly limit their review of challenged academic dismissals to factual questions not involving academic expertise:

> "The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies, and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness or bad faith. The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals." *Id.* at 160.

[1] *Horowitz* underscores in a number of ways the uniqueness of academic decisionmaking and the deference that must be exercised by reviewing courts. The *school* is "the best judge of its students' academic performance and their ability to master the required curriculum." 435 U.S. at 85 n.2. Hearings are not required in academic dismissal or suspension cases (as distinct from disciplinary cases) because a "school is an academic institution, not a courtroom or administrative hearing room" (*id.* at 88) and academic judgments are inherently "more subjective and evaluative" than fact questions surrounding disciplinary cases (*id.* at 90).

Though the precise formulations vary, all the other federal decisions of which we are aware were careful not to substitute the court's judgment for that of schools in academic matters. They consistently hold that a plaintiff cannot secure judicial redetermination of the merits of an *academic* decision. Instead, the plaintiff must tender a genuine issue of fact or law lying within judicial competence. Such issues could arise where a plaintiff presents "positive evidence of ill will or bad motive;" [2] "malice;" [3] inadequacy of fact-finding procedures where educational officials' decisions go beyond academic dismissal or suspension and impose a disability or stigma; [4] or facts indicating racial or other impermissible discrimination.[5] Similarly, courts can determine, without interfering in the merits of academic judgments, whether a dismissal or suspension decision is a pretext for punishing or deterring the exercise of constitutionally protected freedoms.[6]

Many of the federal decisions hold open the possibility —noted but left unresolved in *Horowitz*, *supra*, 435 U.S. at 91-92—that a reviewing court could set aside an academic decision having "no rational basis" [7] or that is

[2] Gaspar v. Bruton, 513 F.2d 843, 851 (10th Cir. 1975); *see also* Hines v. Rinker, 667 F.2d 699, 703 (8th Cir. 1981) ("the decision to dismiss was motivated by bad faith or ill will unrelated to academic performance").

[3] Depperman v. University of Kentucky, 371 F. Supp. 73, 76 (E.D. Ky. 1974).

[4] Greenhill v. Bailey, 519 F.2d 5, 8 (8th Cir. 1975), discussed in *Horowitz*, *supra*, 435 U.S. at 88 n.5; Aubuchon v. Olsen, 467 F. Supp. 568, 572 (E.D. Mo. 1979).

[5] *See* Debra P. v. Turlington, 644 F.2d 397, 408 (5th Cir. 1981); Watson v. University of South Alabama College of Medicine, 463 F. Supp. 720 (S.D. Alabama 1979).

[6] *See* Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Shelton v. Tucker, 364 U.S. 479 (1960).

[7] Hines v. Rinker, *supra*, 667 F.2d at 699-700.

"arbitrary or capricious." [8] But no court conducted its own plenary review of the merits of the academic decision and reached a result different from that of the college or university. Only the court below has employed the "arbitrary and capricious" standard of review to impermissibly "intru[de] into academic decisionmaking." *Horowitz*, *supra*, at 92. The court below did precisely what federal courts should not do: it acted as " 'a sort of educational ombudsman' " exercising a free hand to impose its views on the University. *Keys* v. *Sawyer*, *supra*, 353 F. Supp. at 939.

B. *The Court of Appeals' Decision Infringes Academic Freedom and Illustrates the Evils of Judicial Interference with Academic Decisions.*

The reasons for judicial deference to academic decisions are of long standing and are compelling. Long before *Horowitz*, state courts had firmly established the rule of deference in cases challenging the academic dismissal decisions of public and private schools. In *Barnard* v. *Inhabitants of Shelburne*, 216 Mass. 19, 102 N.E. 1095 (1913), for example, the Supreme Judicial Court held that a jury should not be permitted to decide whether educators had an adequate basis for excluding plaintiff from a public school for substandard academic performance:

> "So long as the school committee act in good faith their conduct in formulating and applying standards and making decisions touching this matter is not subject to review by any other tribunal. It is obvious that efficiency of instruction depends in no small degree upon this feature of our school system." 102 N.E. at 1096.

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[8] *See, e.g.*, Stevens v. Hunt, 646 F.2d 1168, 1170 (6th Cir. 1981); Connelly v. University of Vermont, *supra*, 244 F. Supp. at 160; Keys v. Sawyer, 353 F. Supp. 936, 940 (S.D. Tex. 1973); Depperman v. University of Kentucky, *supra*, 371 F. Supp. at 76; Aubuchon v. Olsen, *supra*, 467 F. Supp. at 572; Bleicker v. Board of Trustees, 485 F. Supp. 1387 (S.D. Ohio 1980).

Many cases, involving both public [9] and private [10] institutions of higher education, adopted comparable principles of review for academic decisions—requiring that the plaintiff come forward and prove the "affirmative proposition" that the decision was actually founded on "bad faith" or similar non-academic factors within the competence of judges. *Barnard* v. *Inhabitants of Shelburne*, *supra*, 102 N.E. at 1097.

These cases recognize that academic institutions, particularly at the graduate and professional levels, are unique. They are not like businesses, government agencies, law firms or courts. Each school aspires above all else to educate students in accordance with that institution's traditional methods and standards of academic attainment. One of the inestimable strengths of this nation's academic institutions is their diversity; our medical schools, law schools and graduate schools—both public and private—have distinct characters and individual identities that exist because they follow their own approaches to teaching and learning. This diversity is the product of tradition and could not exist if schools lacked the freedom to formulate and apply their own academic standards. *See Sweezy* v. *New Hampshire*, 354 U.S. 234, 262-63 (1957) (Frankfurter, J., concurring); J. W. Gardner, *Excellence*, pp. 82-86 (1961).

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[9] *See, e.g.*, People ex rel. Moore v. Lory, 94 Colo. 595, 31 P.2d 1112 (1934); West v. Board of Trustees of Miami University, 41 Ohio App. 367, 181 N.E. 144 (1931); Coffelt v. Nicholson, 224 Ark. 176, 272 S.W.2d 309 (1954).

[10] *See, e.g.*, Tate v. North Pacific College, 70 Or. 160, 140 P. 743 (1914); Frank v. Marquette University, 209 Wis. 372, 245 N.W. 125 (1932); Dehaan v. Brandeis University, 150 F. Supp. 626, 627 (D. Mass. 1957); Edde v. Columbia University, 8 Misc.2d 795, 168 N.Y.S.2d 643 (N.Y. Sup. Ct. 1957), *aff'd*, 156 N.E.2d 458, *cert. denied*, 359 U.S. 956 (1958).

It is always disappointing when a student fails to meet a school's academic standards and is dismissed. Unlike many other institutions, however, a school rarely takes that final step until the student has been given ample opportunity to overcome deficiencies. Ewing certainly had all reasonable opportunities—indeed, a string of "last chances"—and faculty members spent literally hundreds of hours of time in their ultimately unsuccessful efforts to assist him in meeting the University's standards. (J.A. 71, 78). But when the Promotion and Review Committee finally reached the difficult but unanimous conclusion that Ewing still could not satisfy the University's standards for entering into the clinical phase of training, dismissal was the only decision that could uphold the Medical School's traditions and standards.

Surely it would have been easier to give Ewing yet another chance, which would have avoided litigation and postponed the need to make an unpleasant decision. But selecting those who should be permitted to pursue a degree is basic to an institution's "academic integrity" because "the diploma constitutes public endorsement of competence and achievement." *Mahavongsanan* v. *Hall*, 529 F.2d 448, 449 (5th Cir. 1976). The public, which relies on the skill and training of physicians, is better served by conscientious academic decisions than by judicial standard-setting. *Connelly* v. *University of Vermont*, *supra*, 244 F. Supp. at 160-61. The serious consequences of medical incompetence establish a compelling public interest in protecting the ability of medical faculties to uphold strict standards.

Without judicial deference to academic judgments, it would be difficult indeed to preserve the academic "freedom of teachers to teach and of students to learn." *Epperson* v. *Arkansas*, 393 U.S. 97, 105 (1968). Academic freedom is a "special concern of the First Amendment." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.). The " 'four

essential freedoms' " of a university are "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.*, *quoting Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). And a public college or university equally enjoys the right "to select its . . . students and evaluate their performances, and to define and maintain its standards of academic accomplishment." *Cooper* v. *Ross*, 472 F. Supp. 802, 809 (E.D. Ark. 1979). The court of appeals' decision fails to honor these principles of academic freedom and the special character of the academic community.

The perverse consequences of the decision below also illustrate the importance of judicial deference to academic decisions. We have already observed that the court of appeals held that the medical school's grant of retests to other students in the past should have governed Ewing's case. (742 F.2d at 915.) The unarticulated assumptions underlying the court's "precedential" approach to academic standards are that (1) there could be no relevant difference in the records and attributes of the students granted retests, on the one hand, and Ewing, on the other; (2) the faculty's subjective assessments of Ewing's personal fitness to be a doctor should not be taken into account; and (3) schools may not judge each student on his or her individual merits, but must adopt objective and standardized criteria for making academic decisions. None of these assumptions is supported by the record or by applicable legal principles.

To the contrary, the record demonstrates that the court of appeals' bureaucratic thinking was utterly alien to the medical school academic community. One professor who was closely involved in the review of Ewing's case testified that he had never even considered whether other students had been permitted to retake the test, and he regarded other cases as irrelevant, because the school's policy was to treat each student as a unique, individual

case. (Tr. 280-81.) The individual counselling and consideration that Ewing received at all stages of his career at the medical school attests to the school's efforts to avoid standardized, "objective" treatment of its students. It is precisely the need for individualistic and necessarily subjective judgments that accounts for the fact that "the determination whether to dismiss a student for academic reasons . . . is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Horowitz*, *supra*, 435 U.S. at 89-90. Yet the court of appeals would impose rigid rules of uniformity, ignoring that "different students [are] treated differently and accorded individual treatment." *Watson* v. *University of South Alabama College of Medicine*, *supra*, 463 F. Supp. at 727; *see also Pace College* v. *Commission on Human Rights*, 38 N.Y.2d 28, 38, 339 N.E.2d 880, 890 (1975).

If there could be any need for further evidence of the flaws in the court of appeals' approach, one need only consider the host of other questions that it implicitly raised for potential future litigation. If Ewing must be given a retest, what of the number of students who were never allowed to sit for the test at all? (J.A. 66, 165.) Could there be any circumstances in the future in which the medical school may deny a retest to a student who has failed the examination? And are all academic decisions to be judged henceforth by a rule of "consistency" under which the poorest academic record tolerated in the past becomes a judicially enforceable "minimum acceptable standard" for the future?

The decision below accordingly must be reversed. Ewing, who participated actively and repeatedly in the many sessions during which his case was considered and reconsidered, was afforded more procedural protection than the medical student in *Horowitz*, 435 U.S. at 85.[11]

[11] The plaintiff in *Horowitz* was not allowed to appear personally before the academic committees responsible for the decision to dismiss her. 435 U.S. at 80-82. By contrast, after Ewing failed the test, his case was considered by a Promotion and Review Board consisting of fifteen faculty and course directors. This Board reviewed Ewing's entire academic record and decided unanimously that he should be dismissed from the medical school. At Ewing's request, however, the Board reconvened with seventeen medical school professors in attendance, permitted Ewing to have two representatives present, listened to Ewing present his reasons and evidence why he should not be dropped, and considered a written submission in his defense. After this elaborate hearing the decision to dismiss Ewing was reaffirmed, again unanimously. 559 F. Supp. at 794.

Ewing's case was then reviewed, at his request, by the medical school's six-member Executive Committee; again he was permitted to appear and to explain his failure, and again the decision to dismiss him was unanimous. Ewing appeared before this committee on still two more occasions, and again presented documents and testimony; his dismissal was unanimously reaffirmed after each session. *Id.*

There is no claim that the University's procedures were in any way unfair, unlawfully discriminatory, the product of malice or ill will, or designed to punish or deter the exercise of constitutionally protected freedoms. Nor was there any basis for a finding or conclusion that the University's decision was "arbitrary and capricious."

More fundamentally, however, there was no justification for the *de novo* reexamination of the faculty's academic decision undertaken by both the district court and court of appeals. Since the mere prospect of such reexamination of purely academic issues is damaging to academic freedom and decisionmaking, we explain in the following section why this Court should frame in clear terms a standard and scope of review that will prevent the "judicial intrusion into academic decisionmaking" deplored in *Horowitz*, 435 U.S. at 92.

II. There Is No Constitutional or Statutory Basis for Federal Courts to Engage in Substantive *De Novo* Reexamination of the Merits of Academic Decisions.

Horowitz left open two important questions: whether an academic dismissal involves liberty or other interests

"constitutionally protected against deprivation without procedural due process," 435 U.S. at 84, and whether federal courts may conduct a "substantive due process" review of academic dismissals under the "arbitrary and capricious" standard, *id.* at 91-92.

As to the procedural question, the *amici* are strongly committed to an academic process that provides, in every instance of academic dismissal or suspension, the "careful and deliberate"—but informal—procedures upheld as adequate in *Horowitz*, 435 U.S. at 85. Institutions of higher education, public and private alike, agree that schools are obliged to keep students informed of their progress; to assist them in understanding and attempting to overcome their shortcomings; and to dismiss a student only after careful review of his or her case. Higher education is a precious opportunity and both public and private schools recognize the importance of ensuring that decisions affecting students' futures be based on procedures such as those approved in *Horowitz*. We accordingly do not oppose judicial review of the adequacy of such informal *procedures*, whether based on due process, contract or other theories of action.[12]

The "substantive due process" review undertaken below is a different matter entirely. It is reminiscent of the discredited doctrine under which federal courts once re-

[12] Because the *amici* agree that students should not be dismissed from educational institutions without appropriate procedural protections, we do not address directly the first issue left open by *Horowitz*—whether an academic dismissal involves constitutionally protected "liberty" or "property" interests. We do not disagree with the assumption of both lower courts that such interests existed here. Most academic dismissal cases will implicate property interests arising from the university-student contractual arrangement or other state law source, if not a liberty interest arising from the potential impact of the university's actions on the student's reputation or career. *See Horowitz, supra,* 435 U.S. at 82-84; Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972).

viewed the merits of state economic legislation under a standard of reasonableness. *See Ferguson* v. *Skrupa*, 372 U.S. 726, 728-32 (1963). Few courts have abused the "arbitrary and capricious" review standard in the manner of the court of appeals, and virtually all who have engaged in such a review have ultimately deferred to academic judgments and expertise. But this case shows that the mere availability of an "arbitrary and capricious" review can be pernicious, because it can embroil even the most conscientious and good-faith academic decisions in protracted litigation in which courts conduct *de novo* reexamination of purely academic matters.

Here, the University is still locked in litigation some four years after Ewing failed the NMBE test. After devoting hundreds of faculty-hours to review and reconsideration of his case, the University was sued in federal court. Faculty members spent many more hours testifying in depositions and at trial, explaining the basis of their academic decisions. The faculty's decisions with respect to many other students were drawn into the case, and the court was in effect asked to compare their academic performance and potential to be a physician with Ewing's. Only after the completion of discovery and trial did the district court finally recognize that it could not and should not make the academic judgments implicit in the "arbitrary and capricious" standard. (559 F. Supp. at 799.) Other reported cases show that federal courts are conducting similar *de novo* reexaminations of academic decisions, only to realize belatedly that the academic character of the issues places them beyond judicial competence.[13]

The mere prospect of such litigation disrupts and demoralizes the academic community. Faculty members,

[13] *See, e.g.*, Stevens v. Hunt, *supra*, 646 F.2d 1168; Watson v. University of South Alabama College of Medicine, *supra*, 463 F. Supp. 720; Aubuchon v. Olsen, *supra*, 467 F. Supp. 568.

concerned about being named as defendants or losing time diverted by litigation, can only be more inclined to compromise academic standards. Subjective judgments and individualized consideration of cases will present greater risks of litigation than reliance on less meaningful but "objective" standards of performance. If those who formulate and apply academic standards must take into account the risk that their good-faith academic evaluations can be reexamined on the merits by the courts, the teaching and evaluation process can only become defensive, more formalized, and adversarial with respect to the students who most need sympathetic support and assistance. This is precisely the risk this Court recognized in *Horowitz*, 435 U.S. at 90. Prudent university counsel would advise their clients *not* to give students like Ewing special attention and extra "chances" to make good, but rather to make an objective "record" that will hold up in court in the event of litigation.

We accordingly urge the Court to resolve the "substantive due process" review question left open in *Horowitz* by holding that federal courts should not conduct their own *de novo* review of the merits of academic decisions on an "arbitrary and capricious," "rational basis," or similar standard of review. The federal courts do not ordinarily engage in substantive reviews of state decisions, but concern themselves instead with whether a decision affecting a liberty or property interest has been made in accordance with procedures " 'appropriate to the nature of the case.' " *Goss* v. *Lopez*, 419 U.S. 565, 579 (1975), *quoting Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). Indeed, the Seventh Circuit adopted the view, in an academic tenure case, that if there is no violation of procedural due process "it follows that no substantive due process claim has been stated either." *McElearney* v. *University of Illinois*, 612 F.2d 285, 291 (7th Cir. 1979).

Here, the procedures for consideration and reconsideration of Ewing's case were more elaborate than the informal procedures held adequate in *Horowitz*. Ewing was afforded the chance to appear personally before the responsible faculty committees on several occasions. (559 F. Supp. at 794.) Where a faculty follows procedures so amply calculated to avoid mistakes or arbitrariness, there can be no reasonable need for a judicial reexamination of the merits of the academic decision.

That is particularly so because the kind of "state action" involved here—academic decisionmaking—does not warrant the heightened judicial scrutiny that was accorded by the court of appeals.[14] There is no evidence of which we are aware that the academic decisionmaking process is resulting in arbitrary and capricious suspensions or dismissals, or is otherwise in need of judicial supervision. Substantive review of state actions is often an appropriate procedure in cases alleging deprivation of the fundamental rights and liberties embodied in the Constitution—such as freedoms of expression, religion, privacy and the right to equal treatment without regard to race or sex.[15] But there is no "substantive constitutional righ[t]" to public education requiring special judicial vigilance. *See San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 33 (1973). On the contrary, academic freedom itself is a fundamental interest that is burdened by judicial reexamination of the merits of academic decisions, and the balancing of interests at stake inclines strongly in favor of protecting the academic process from the disruption of unnecessary judicial intrusion.

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[14] *See* Bishop v. Wood, 426 U.S. 341, 349-50 (1976); Clark v. Whiting, 607 F.2d 634, 638 (4th Cir. 1979) (dismissing equal protection and due process claims of professor denied promotion, noting that "not every difference in promotion treatment . . . rises to the level of a constitutional deprivation . . . .").

[15] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Kelley v. Johnson, 425 U.S. 238, 244 (1976); Brown v. Board of Education, 347 U.S. 483, 493-95 (1954).

The appropriate balancing of rights and interests here is, in the final analysis, quite like that performed in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982). There, a patient in a state mental institution sued under Section 1983 to vindicate his alleged right to "minimally adequate care and treatment." Concerned that the "courts must show deference to the judgment exercised by a qualified [medical] professional" (457 U.S. at 322), and that those providing treatment "should not be required to make each decision in the shadow of an action for damages" (*id.* at 325), this Court held that reviewing courts must limit their review to determining only "that professional judgment was in fact exercised." *Id.* at 321. In this way, the courts would avoid embroilment in medical issues beyond their competence unless there were facts "demonstrat-[ing] that the person responsible actually did not base the decision on such a [professional] judgment." *Id.* at 323.

Federal courts must of course remain free in Section 1983 cases to review non-academic matters within their competence. Such review would be appropriate where plaintiffs raise a genuine issue calling into question the fairness of the procedures that were followed;[16] show malice, ill will, or unlawful discrimination by the decisionmakers; or demonstrate attempts to punish or deter students' exercise of constitutionally protected freedoms. Review of these matters does not interfere with academic judgments made in good faith, and the courts should examine the facts where a student presents "positive evidence" that an academic decision was influenced by impermissible considerations or motivations. *Gaspar* v. *Bruton*, *supra*, 513 F.2d at 851; *see also*, *Jansen* v.

[16] It bears repeating that informal procedures, such as those held adequate in *Horowitz*, are all that should be required for academic dismissal cases. For reasons discussed in *Horowitz* and this brief (pp. 7-10, *supra*), formal adversary procedures are not compatible with academic decisionmaking and the educational process.

Emory University, 440 F. Supp. 1060, 1063 (N.D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978); *Hubbard* v. *John Tyler Community College*, 455 F. Supp. 753, 756 (E.D. Va. 1978); *Keys* v. *Sawyer*, *supra*, 353 F. Supp. at 939; *Dietz* v. *American Dental Ass'n*, 479 F. Supp. 554, 559 (E.D. Mich. 1979).

By so placing on plaintiffs the "burden of proving . . . an affirmative proposition," and not permitting substantive review of the merits of academic judgments, academic decisionmaking will enjoy the protections it needs and deserves. *Barnard* v. *Inhabitants of Shelburne*, *supra*, 102 N.E. at 1097.

CONCLUSION

For the reasons stated, the American Council on Education, the Association of American Medical Colleges and the Federation of State Medical Boards respectfully urge that the decision below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

vs.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

BRIEF OF THE CURATORS OF THE UNIVERSITY OF MISSOURI AND THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA AS *AMICI CURIAE* SUPPORTING PETITIONER

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BRIEF OF THE CURATORS OF THE UNIVERSITY OF MISSOURI AND THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA AS *AMICI CURIAE* SUPPORTING PETITIONER

This brief is filed on behalf of The Curators of the University of Missouri and The Board of Regents of the University of Nebraska in support of the petitioner. Consent to file this brief has been obtained from counsel for the parties and has been filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

The Curators of the University of Missouri is the legal title of the University of Missouri, the state university of the State of Missouri, which operates two separate medical schools. It was the petitioner in *Board of Curators of the University of Missouri, et al. v. Horowitz,* 435 U.S. 78 (1978), which was concerned with procedural due process requirements of a medical

student dismissed for academic deficiency and which raised but did not directly answer the question of whether federal courts may review such dismissals from a substantive due process standpoint.

The Board of Regents of the University of Nebraska is the legal title of the University of Nebraska, the state university of that State. It operates a medical center which includes a school of pharmacy and is currently involved in litigation filed by a pharmacy student wherein substantive due process is a basic issue. That case is pending before the U.S. Court of Appeals for the 8th Circuit, the student having appealed an adverse decision by the trial court. The case is *Ikpezu v. University of Nebraska,* CV85-1090-NE, pending in the Eighth Circuit Court of Appeals in St. Louis, Missouri.

THE ELEVENTH AMENDMENT IS A JURISDICTIONAL BAR TO A 42 U.S.C. §1983 FEDERAL ACTION SEEKING AN INJUNCTION AGAINST A STATE INSTRUMENTALITY.

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or Subjects of any Foreign State."

The Amendment was proposed and later ratified by the requisite number of states in direct response to the 1793 decision of this Court in *Chisholm v. Georgia,* 2 Dall. 419, 1 L.Ed. 440 (1793) which held that a citizen of another state could bring an action in federal court against the State of Georgia.

For almost 100 years, the Amendment has been interpreted by this Court to preclude actions brought in federal courts against a state by one of its own citizens. *Hans v. Louisiana,*

134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) cited with approval in *Employees v. Missouri Public Health Department,* 411 U.S. 279, 280, 93 S.Ct. 1614, 1616, 36 L.Ed.2d 251 (1973).

Although the Eleventh Amendment bars only some actions against state officials, it is a virtually absolute bar to suit in federal court against an unconsenting state, an unconsenting state agency or an unconsenting state department *Pennhurst State School & Hospital v. Halderman,* ____ U.S. ____, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984), without regard to the nature of the relief sought. The only narrow exception is the one recognized by this Court in *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 552 (1978) and *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).

In *Fitzpatrick,* Id at 427 U.S. 456, this Court held that

> "... Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."

In so holding in *Fitzpatrick, supra,* the Court closely scrutinized the language and legislative history of the 1972 Amendments to Title VII of the Civil Rights Act of 1964 making the act applicable to state and local governments and determined that the congressional intent to permit private suits against the State as employer was clearly present.

The holding in *Fitzpatrick* that Congress may act pursuant to §5 of the Fourteenth Amendment to subject the State to private suits otherwise constitutionally impermissible implies that not every congressional enactment pursuant to the Fourteenth Amendment wipes away that immunity.

What was implicit in *Fitzpatrick* was certainly explicit in *Quern v. Jordan,* 440 U.S. 332, 345, 99 S.Ct. 1139, 1147, 39 L.Ed.2d 358 (1979). Referring to 42 U.S.C. §1983, the Court held:

> "§1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States."

Relying heavily on *Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978), the Court determined in *Quern v. Jordan, supra* at 440 U.S. 341, 99 S.Ct. 1145, that the statutory language and legislative history was insufficient to conclude:

> "that Congress intended by the general language of §1983 to override the traditional sovereign immunity of the States."

Thus, it is clear that Congress did not abrogate the States' Eleventh Amendment immunity by the passage of 42 U.S.C. §1983.

The jurisdictional bar to suit in federal court against an unconsenting state applies both to suits at law and suits in equity. *Missouri v. Fiske,* 290 U.S. 18, 27, 54 S.Ct. 18, 21, 78 L.Ed.145 (1933) cited with approval in *Pennhurst, supra; Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978).

In *Alabama v. Pugh, supra,* this Court reversed a judgment in a §1983 action which enjoined the State of Alabama and the Alabama Board of Corrections as well as various state officials. In so doing, the court distinguished between suits brought against the state and suits brought against state officials and held:

> "There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit." *Alabama v. Pugh,* 438 U.S. at 782, 98 S.Ct. 3057 (1978)."

Because it is clear under *Pennhurst* that the Eleventh Amendment immunity protects an unconsenting state, its agencies and departments from private suits in federal court in injunctive actions as well as those seeking monetary relief and under *Alabama v. Pugh* that Congress did not abrogate that immunity by enactment of 42 U.S.C. §1983 *Alabama v. Pugh, supra,* it is clear that Petitioner's contention on the Eleventh Amendment issue is correct if:

1) Petitioner, Regents of the University of Michigan, is the alter ego of the State for purposes of Eleventh Amendment immunity (which Respondent does not dispute); and

2) Petitioner has not waived its Eleventh Amendment immunity.

In considering the second issue, we would respectfully urge this Court to adhere to the teachings of *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 277, 79 S.Ct. 785, 787, 3 L.Ed.2d 804 (1959) that "where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts."

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE SUBSTANTIVE REVIEW OF A STUDENT'S ACADEMIC PERFORMANCE

The courts of this nation, whether federal or state, have consistently deferred to the expertise of professionals in education on matters involving evaluation of a given student's academic progress and achievement. This is particularly true in higher education and indeed must continue to be so if we are to maintain the quality of education which this nation expects and deserves. It has been stated that: "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraints. . . . By and large, public

education in our Nation is committed to the control of state and local authorities." *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968). This quotation was used by the Supreme Court in the decision in *Board of Curators of the University of Missouri, et al. v. Horowitz,* 435 U.S. 78 (1978), and in so quoting it held that there was no reason to intrude on that historic control in that case. It is respectfully submitted that the same deference to the same historic control is called for in the case at bar.

In *Horowitz* the Court extensively addressed the issue of procedural due process in academic dismissal cases. Since that decision various courts have faced the issue of what impact, if any, *Horowitz* has upon substantive due process under the Fourteenth Amendment in academic dismissals. Their decisions do not agree as to whether a student who has been dismissed for academic deficiences from a public institution of higher education has an actionable substantive due process claim. See *Hines v. Rinker,* 667 F.2d 699 (8th Cir. 1981), *Stevens v. Hunt,* 646 F.2d 1168 (6th Cir. 1981), *Lavash v. Kountze,* 473 F. Supp. 868 (D. Mass. 1979), *Hubbard v. John Tyler Community College,* 455 F. Supp. 753 (E.D. Va. 1978), *Watson v. University of South Alabama College of Medicine,* 463 F. Supp. 720 (S.D. Ala. 1979), and *Aubuchon v. Olsen,* 467 F. Supp. 568 (E.D. Mo. 1979).

But *Horowitz* stated:

> "In reversing the District Court on procedural due process grounds, the Court of Appeals expressly failed to 'reach the substantive due process ground advanced by Horowitz,' 538 F.2d at 1321, n. 5. Respondent urges that we remand the cause to the Court of Appeals for consideration of this additional claim. In this regard, a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or capricious.' . . . Even assuming that the courts can review under such a standard an academic decision of a public educational institution,

> we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case. Courts are particularly ill-equipped to evaluate academic performance. The factors discussed in Part II with respect to procedural due process speak a fortiori here and warn against any such judicial intrusion into academic decision-making." P. 91.

The Court thus most appropriately concluded that the courts are ill-equipped to evaluate academic performance and refused to engage in the process of second-guessing a qualified faculty of a medical school. The Court certainly did not state that there is a legal right for a student to have the courts review academic evaluations. It only reported the dictum of a number of lower courts which implied but did not hold that such a dismissal might be enjoined if it were shown to have been arbitrary and capricious.

The institutions submitting this brief suggest that, in cases involving dismissals for academic performance, the line between procedural and substantive due process disappears. *Horowitz* suggested as much in the above quotation. The very touchstone of due process is fairness, but neither fairness nor the Fourteenth Amendment extends to a student the right to have a court reevaluate his/her academic performance. A student who has been treated fairly, as in *Horowitz,* has received appropriate constitutional protections; thus, to review the fairness of the procedures used will reveal the rational basis for the decision itself. There is no dispute concerning the fairness of the procedures in the case at bar. Countless hours were spent by Petitioner's faculty evaluating Respondent's performance and carefully considering his explanations of his academic deficiencies.

For those who read *Horowitz* as sanctioning substantive due process review, the most that can be said of the case is that it set the standard of review to be simply whether the decision to dismiss a student was arbitrary or capricious. If a dismissal is

reviewed under such a standard, it should be incumbent upon a student to prove that the decision lacked any rational basis and was motivated by factors unrelated to academic performance. See *Hines v. Rinker,* 667 F.2d 699 (8th 1981), *Stevens v. Hunt,* 646 F.2d 1168 (6th 1981), *Lavash v. Kountze,* 473 F.Supp. 868 (D. Mass. 1979), *Gaspar v. Bruton,* 513 F.2d 843 (10th Cir. 1975), *Greenhill v. Bailey,* 519 F.2d 5 (8th Cir. 1975), *Horowitz v. Board of Curators of the University of Missouri,* 447 F. Supp. 1102 (W.D. Mo. 1975). Even if one assumes this standard of review to be appropriate, it is submitted that, "Respect for the discretion of those best qualified to make such judgments dictates that the Medical School and not the federal courts should determine the qualifications of appellant (student) to continue his medical studies." *Hines v. Rinker,* at p. 704. Faculties of institutions of higher education *must* employ subjective judgment in evaluating academic performance and the Supreme Court in the *Horowitz* decision recognized the necessity of and judicially approved such evaluation. To hold that under the guise of substantive due process a court can reevaluate, de novo, academic performance is in essence saying that use of subjective judgment is presumed suspect and higher education must be restricted to academic evaluation by objective standards. No court has ever gone this far in an academic dismissal case except the Court of Appeals in this case.

To require such review of an academic dismissal decision will put courts on the horns of a dilemma in that they have always deferred to the professional judgment of faculties. If one recognizes another's expertise it is extremely difficult, if not impossible, to review the expert's decision to see if it is correct.

It is therefore respectfully submitted that the due process clause of the Fourteenth Amendment does not call for a substantive review of an academic dismissal and that evaluation of academic performance should remain exclusively with the faculty of an institution of higher education.

This is particularly true in the case at bar since there was no showing that Respondent had been dismissed for invidious non-academic reasons, such as race or sex. The district court, just as did the district court in *Horowitz,* explicitly found that the decision to dismiss Respondent was not arbitrary or capricious. That finding was not clearly erroneous. This court in *Anderson v. City of Bessemer City, North Carolina,* No. 83-1623, 53 L.W. 4314, decided March 19, 1985, prescribed the appropriate standard of appellate review and discussed in that opinion the 'clearly erroneous' rule:

> ". . . a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." 53 L.W. 4317.

In the case at bar the trial judge made several specific findings of fact, including that the dismissal decision was not arbitrary or capricious. The Court of Appeals concluded that the trial court was in error entirely because of the single fact that the student was the only medical student not allowed to retake Part I of the medical examination known as NBME Part I. The Court of Appeals thus made a substantive academic decision which is reversible because it ignored Respondent's numerous academic deficiencies and also because it misapplied the clearly erroneous standard for appellate review.

CONCLUSION

It is respectfully requested that the Court reverse the decision of the Sixth Circuit Court of Appeals for the reasons hereinbefore set forth.

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No. 84-1273.

In the Supreme Court of the United States.

OCTOBER TERM, 1984.

REGENTS OF THE UNIVERSITY OF MICHIGAN,
PETITIONER,
v.
SCOTT E. EWING,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief of Duke University, President and Fellows of Harvard College, The Johns Hopkins University, Northwestern University, The Washington University and Yale University
Amici Curiae.

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Amici Curiae.

Interest of *Amici Curiae*.

The *amici* are major private universities that are engaged in teaching and research in numerous disciplines, including medicine. In each of the six universities, faculty members play a central role in setting and administering academic standards, and in the medical schools of the six universities faculty review committees similar to the University of Michigan's ("Michigan") determine the academic qualifications and status of medical students.

This case involves important questions concerning the ability of judges to overturn university decisions on the academic status of students. Assessing academic qualifications is at the core of the teaching process, and traditionally educators have exercised this function free of external influence and intrusion. The *amici* believe that the continuation of this principle is vital to the preservation of excellence in higher education in general, and in medical education in particular, and to the continued independence of institutions of higher education in academic matters.

The lower court held that Michigan, a public university, denied respondent Scott E. Ewing ("Ewing") due process in violation of 42 U.S.C. § 1983.[1] Although as private universities *amici* would not be directly affected by this ruling, all of higher education has a strong interest in the maintenance of academic independence by public universities. Unwarranted judicial control over the academic qualifications of students at public universities lowers the quality of the national teaching and research effort and erodes the concept of academic freedom. Moreover, there are dangers for *amici* arising out of the lower court's application of its view that Ewing had a property right stemming from an express or implied contract with Michigan. Even if private universities are unconstrained by the Fourteenth Amendment, an affirmance by this Court might be construed as approving the lower court's contract theory, and thereby threaten the ability of private universities to continue to carry out their educational responsibilities without improper judicial intervention.

The *amici* hope that the analysis of these issues by private universities will be of assistance to the Court.[2]

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[1] *Ewing* v. *Board of Regents of University of Michigan*, 742 F.2d 913, 915-916 (6th Cir. 1984).

[2] Pursuant to Rule 36.2 of the Rules of this Court, both parties have consented to the filing of this brief. Copies of the written consents from the petitioner and the respondent have been lodged with the Clerk.

Statement of the Case.

At issue here is Michigan's decision to discontinue Ewing's participation in its "Inteflex Program," a combined program of undergraduate and medical education leading to the award of both the B.A. and M.D. degrees.[3] Although the event which precipitated Michigan's decision to drop Ewing from registration was his failure on the National Board of Medical Examiners Part I examination ("NBME Part I"), that event culminated six years during which Ewing repeatedly failed to meet scholastic standards. As discussed below, Michigan's final decision was based on an evaluation of his entire performance.

Ewing entered the Inteflex Program in the fall semester of 1975. In his first year, he encountered difficulty in handling the work and did not take the final examination in biology or complete the freshman seminar. 559 F.Supp. at 793. The following semester he withdrew from a psychology course, was advised that he would not be permitted to take the patient care course ordinarily taken that semester, and was placed on an irregular program. *Id.*

In July, 1976, Ewing's status was considered by the Promotion and Review Board, the faculty committee responsible for reviewing students' progress at regular intervals, passing upon students' qualifications, and imposing appropriate conditions for continued study with respect to each candidate. Petition at 4. Ewing requested, and was granted, a leave of absence. 559 F.Supp. at 793.

Ewing returned to Michigan in the winter of 1977. He experienced academic difficulty throughout the 1978-79 and 1979-80 years, received several incompletes and grades below

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[3] This factual summary is based primarily on the opinions of the courts below, and the statement of relevant facts contained in Michigan's Petition for a Writ of Certiorari ("Petition").

"C", and was again placed on an irregular program. *Id.* at 793-95. The Promotion and Review Board advised him that "any further deficiencies in the Program would be grounds for dismissal from registration." *Id.* at 795.

By the end of the 1980-81 academic year, Ewing had been in the Inteflex Program six years, but had completed only four years' work. *Id.* He had received seven incompletes, withdrawn from one course, and failed another course which he was required to repeat. On three occasions he had been placed on probation and warned that any further deficiencies could lead to his dismissal. Petition at 5.

In June, 1981, Ewing took the NBME Part I. A student must pass this examination before progressing to the clinical stage of medical study, and failure is treated as a formal deficiency by faculty review boards. Petition at 6. A score of 345 on the NBME Part I was considered passing. Ewing received a score of 235, which the district court found was "not only the lowest score in his class, but the lowest score ever recorded by a . . . Michigan student in the Part I examination." 559 F. Supp. at 794. A short time later, the Promotion and Review Board voted unanimously to drop Ewing from registration in the Inteflex Program. In a meeting with the board on July 31, 1981, Ewing acknowledged that he had been aware of the meaning of the warning letters advising him that further deficiencies would lead to his being dropped from the program but offered various explanations for his continued unsatisfactory performance. *Id.* at 796.

Ewing appealed the Promotion and Review Board's decision to the medical school's Executive Committee, which reviewed the entire record and discussed the matter with Ewing and his representatives at three meetings. The Executive Committee unanimously affirmed the decision of the Promotion and Review Board. *Id.* Petition at 8-9.

Ewing then commenced this action in the United States District Court for the Eastern District of Michigan. He sought

an order compelling Michigan to permit him to retake the NBME Part I, and alleged, *inter alia*, that Michigan's action in discontinuing his participation in the Inteflex Program denied him substantive due process in violation of 42 U.S.C. § 1983 (Count I) and breached his contractual relationship with Michigan (Count II). 559 F. Supp. at 797. Following a bench trial, the District Court found in favor of Michigan and against Ewing on all counts.

On appeal, the United States Court of Appeals for the Sixth Circuit reversed and ordered that Ewing be permitted to retake the NBME Part I and that, should he pass, he be reinstated in the Inteflex Program. 742 F.2d 913, 916.

Summary of Argument.

I.

The decision of the Court of Appeals represents an unwarranted judicial interference in matters of academic judgment and expertise.[4] Michigan's decision to drop Ewing from registration in the Inteflex Program, based on a comprehensive review of his record, is precisely the sort of academic judgment that should not be subject to judicial reexamination. *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78, 92 (1978). This Court has acknowledged that only educators possess the knowledge, experience, and expertise necessary to judge the qualifications of students. In the area

[4] The *amici* have limited their brief to the issues raised by this case which affect private universities. Accordingly, this brief does not address the issue of whether the Eleventh Amendment bars the relief ordered by the Court of Appeals, or issues raised by application of the Fourteenth Amendment to public universities.

of medical studies, judgments of academic officials concerning the qualifications of students are entitled to particular weight. Even if some limited judicial recourse is appropriate, the decision of a university to dismiss a student for academic reasons should be upheld unless the student establishes that the dismissal was devoid of any rational basis or motivated by bad faith or ill will unrelated to academic performance.[5]

The court below violated this standard. By limiting its focus to Ewing's performance on a single examination and by comparing Michigan's decision to drop Ewing from registration with decisions concerning other students with different academic records, the court below disregarded the fact that Michigan's decision was based on an evaluation of Ewing's entire record and an assessment of his individual academic performance and fitness to continue medical study. In effect, the Court of Appeals substituted its own criteria for evaluating students for that of Michigan's faculty.

The approach followed by the court below, if upheld, would diminish the ability of educators to administer the system of individual and ongoing evaluation which is vital to the educational process. Neither the interests of education nor the advantages that society derives from educational institutions would be served by the involvement of courts in reviewing on the merits a careful and deliberate academic evaluation. Moreover, judicial review on the merits leads to inefficient use of judicial and academic resources.

II.

The legal relationship between the university and its students must be viewed in light of the unique objectives of the educa-

[5] The *amici* recognize, of course, that the discretion traditionally accorded universities over academic matters does not mean that institutions may use the academic evaluation process as a pretext to engage in invidious discrimination. There is, however, no allegation of discrimination in this case.

tional process and the well-established authority of educators to determine academic qualifications. Educators must retain broad discretion to determine, in good faith, a student's fitness based upon an evaluation of the student's individual academic performance. Inherent in the teaching function is the ability to establish conditions for continued study based upon an assessment of a student's performance and potential, in the context of the demands of the particular academic program and the profession for which the student is preparing.

Insofar as a court views the relationship between the university and its students as contractual, the court's task is to determine the student's reasonable expectations concerning the conditions for continued study. Those expectations are the result of ongoing evaluation and counseling which keep students apprised of their progress and the possible consequences of unsatisfactory performance. Ewing was repeatedly warned that failure to improve would result in his being dropped from registration, and he cannot complain that he was misled or subjected to ill-considered action.

Argument.

I. THE DECISION OF THE COURT OF APPEALS CONTRAVENES THE TRADITIONAL RULE OF DEFERENCE TO UNIVERSITY OFFICIALS IN ACADEMIC AFFAIRS.

A. *Important Policy Considerations Require Respect for Decisions of Academic Officials Concerning the Qualifications of Students.*

For very good reasons, courts have respected the principle of judicial non-interference in scholastic affairs. Decisions such

as who should be admitted to an educational institution, what courses should be available, and whether academic standards have been satisfied do not involve the types of factual disputes capable of resolution by a court. To a substantial degree, such decisions involve subjective judgment by experienced professionals. Such decisions require expertise that the judiciary generally does not possess. Deference by the courts is particularly important in the area of medical studies, where decisions concerning students encompass an evaluation of clinical competence, peer and patient relations, and organizational skills, as well as the ability to master a body of knowledge and attain a standard of scholarship.[6] In weighing a candidate's fitness for continued study, medical school faculty members bring to bear the knowledge accumulated through years of professional experience in teaching, practice, and research. This experience uniquely qualifies them to make comparative judgments concerning the performance of candidates and to evaluate each student's potential for a successful career in medicine in light of the insights gained by observing former students pursue their academic program and then advance into the profession.

These policy considerations were reflected in this Court's caution in *Horowitz* that

> a judgment [whether to terminate a student's medical studies for academic deficiency] is by its nature more subjective and evaluative than the typical factual question presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade

[6] The rule of judicial nonintervention in scholastic affairs is "particularly applicable in the case of a medical school" because "[c]ourts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine [citation omitted]." *Connelly* v. *University of Vermont and State Agricultural College*, 244 F. Supp. 156, 160-61 (D. Vt. 1965).

> for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making. 435 U.S. at 90.
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> Courts are particularly ill-equipped to evaluate academic performance. The factors discussed [above] . . . speak *a fortiori* here and warn against any such judicial intrusion into academic decisionmaking. *Id.* at 92.[7]

Respect for the judgment of educational officials on purely academic matters also has constitutional underpinnings. In *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), Justice Frankfurter's concurring opinion pointed out the necessity for "the exclusion of governmental intervention in the intellectual life of the university," *id.* at 262, and recognized "four essential freedoms" for an educational institution: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263.

Justice Powell's lead opinion in *Regents of University of California* v. *Bakke* echoed this position:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special

[7] See also *Gaspar* v. *Bruton*, 513 F.2d 843, 850-51 (10th Cir. 1975); *Wilkenfield* v. *Powell*, 577 F. Supp. 579, 583 (W.D. Tex. 1983); *Lightsey* v. *King*, 567 F. Supp. 645, 647-48 (E.D.N.Y. 1983); *Connelly* v. *University of Vermont and State Agricultural College*, *supra*, 244 F. Supp. at 161; *Barnard* v. *Inhabitants of Shelburne*, 216 Mass. 19, 102 N.E. 1095 (1913).

> concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. 438 U.S. 265, 312 (1978) (opinion of Powell, J., announcing the judgment of the Court).

It need hardly be added that "selection of its student body" encompasses a university's freedom to determine the academic qualifications of students to continue study after they have matriculated.[8]

B. *The Court of Appeals Misinterpreted the "Arbitrary and Capricious" Standard.*

Guided by the foregoing considerations, courts wisely have refrained from attempting to review a university's academic assessment. Until the decision of the court below, no court had explicitly recognized a cause of action for violation of substantive due process arising out of the dismissal of a student from a university on academic grounds. Even those courts that have implied in dictum that such a cause of action exists have been unanimous in narrowly limiting the scope of judicial inquiry by requiring that the plaintiff prove that a dismissal was "arbitrary and capricious" in the strict sense: devoid of any rational basis or motivated by bad faith or ill will. See, e.g., *Horowitz*, 435 U.S. at 90-92; *Stevens* v. *Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981); *Gaspar* v. *Bruton, supra*, 513 F.2d at 850-851; *Connelly* v. *University of Vermont and State*

[8] Scholars agree that there are sound constitutional and policy reasons for judicial deference to academic expertise in such matters. See, e.g., Wright, "The Constitution on the Campus," 22 Vand. L. Rev. 1027, 1070 (1969); "Developments in the Law — Academic Freedom," 81 Harv. L. Rev. 1045, 1139, 1152 (1968).

Agricultural College, supra, 244 F. Supp. at 161.[9] The court below, although paying lip service to the arbitrary and capricious standard, proceeded to ignore the substance of what Michigan had done and to substitute its review for Michigan's.

No one contests that Ewing's dismissal from Michigan's Inteflex Program was based upon a good faith evaluation of his entire academic record, and that nonacademic factors played no part in Michigan's decision. When these facts exist, there is no need for further judicial inquiry.[10]

In resting its decision on the fact that other students were allowed a second opportunity to pass the NBME Part I, the Court of Appeals disregarded entirely the essential nature of Michigan's action: a thorough review of Ewing's performance during his six years of study and a conclusion based on his complete record — including Ewing's receipt of the lowest score ever recorded on the NBME Part I by a University of Michigan medical student — that he was not qualified to continue medical studies. The premise of the Sixth Circuit's deci-

[9] Even commentators who argue that academic dismissal may give rise to a cause of action for violation of substantive due process accept the "arbitrary and capricious" standard and define that standard to require proof that the university's decision was based on other than academic considerations. See, e.g., Dassem, "*Board of Curators of the University of Missouri* v. *Horowitz*: Academic Versus Judicial Expertise," 39 Ohio State L.J. 476, 484 (1978).

[10] Without disturbing the trial court's finding that Michigan's decision was based solely on academic considerations and was not motivated by bad faith or ill will, the Court of Appeals concluded that Michigan was arbitrary and capricious because it failed in Ewing's circumstances to follow its past practice of allowing other students a reexamination. 742 F.2d at 915-916. In so holding, the appeals court did not attempt to distinguish prior caselaw interpreting the "arbitrary and capricious" standard as requiring a showing that the university's decision was irrational or based on nonacademic factors. Nor did the appeals court discuss Ewing's record of academic deficiencies, the Promotion and Review Board's warnings that further deficiencies could result in dismissal, the fact that Ewing failed the NBME Part I while on academic probation, or the fact that both the Promotion and Review Board and the Executive Committee based their decisions on thorough evaluations of Ewing's entire record.

sion is that because Ewing was "qualified" to sit for the NBME Part I examination, Michigan was arbitrary in denying him permission to repeat the examination, while providing that opportunity to other "qualified" students. 742 F.2d at 916. Such an approach misperceives the academic evaluation process and would substitute mechanical rules for student-by-student evaluation. No two students are identical. The fact that two students may be in "good standing" or "qualified" to sit for an examination by no means suggests that their academic records, or the conditions of their continued enrollment, are the same or even similar.

In the instant case, Ewing was "qualified" only in the sense that he was eligible to take the NBME Part I. His record was marked by failing, marginal or incomplete work, probations, leaves of absence, and warnings from the Promotion and Review Board that failure to improve could result in dismissal. Faced with this cumulative record of deficiencies, any of the *amici* institutions which administer the NBME Part I could reasonably have concluded that his abysmal failure on that exam was "the straw that broke the camel's back" (J.A. 79). In each case, that decision would be based on the student's total record, and not the NBME Part I results viewed in isolation.

In effect, the Court of Appeals substituted its own judgment concerning the proper criteria for continued participation in the Inteflex Program for that of the medical school faculty, and determined that a passing grade on the NBME Part I should entitle a student to continued participation, regardless of other qualifications or deficiencies. However, educators, and not judges, are qualified to make these decisions, and courts have traditionally left these decisions to educators. *Hines* v. *Rinker*, 667 F.2d 699, 704 (8th Cir. 1981). Judgments concerning academic performance should continue to rest with experienced university personnel.

C. *If Affirmed, the Decision Below Would Have Harmful Educational Consequences.*

If allowed to stand as a model, the mechanical approach taken by the Court of Appeals would curtail the ability of academics to use informed judgment on a case-by-case basis when making decisions about students. Students and ultimately the public would inevitably suffer the consequences. The discretion traditionally accorded academic promotion and review boards enables them to monitor each student's progress and tailor appropriate conditions for students encountering difficulty. In the case of medical education, this discretion, placed in the hands of professionally qualified people, is especially vital because training is complex and school officials are mindful that graduates will engage in medical practice and research and thereby have considerable responsibility for the health and safety of others.

If the lower court's approach were followed, educators would be inhibited, for example, from allowing generally capable students who temporarily fall below academic standards from continuing their studies, lest they lose the prerogative to terminate chronically deficient students. Where a student with an otherwise satisfactory record fails a course or examination, continued enrollment may well be appropriate. Where a different student with a record of repeated deficiencies fails the same course, however, probation or dismissal may be warranted.

A student's fitness to continue studies, and the conditions upon which he or she may do so, must be determined on an individual basis by experienced university officials. A medical school's decision concerning one student should not be dictated by its decision concerning another student. Nor should promising students be penalized by the application of inflexible rules that do not take into account all aspects of a student's abilities and potential. The approach taken by the Court of

Appeals would tie the hands of university officials charged with the responsibility both of maintaining high academic standards and assisting competent students to complete their academic programs. See *Giles* v. *Howard University*, 428 F. Supp. 603, 606 (D.D.C. 1977).

The tradition of judicial deference to academic expertise in the educational process has contributed to one of the finest systems of medical education in the world. That system will be jeopardized if courts cease to respect the judgments of educators in strictly academic matters.

D. *Efficient Use of Judicial and Academic Resources Requires Strict Application of the "Arbitrary and Capricious" Standard.*

The district court ultimately reached the correct result concerning Ewing's claims of denial of due process and breach of contract. It did so, however, only after lengthy discovery and a full trial in which Ewing attempted to compare his performance to that of other students in both the Inteflex and standard medical education programs.

Such protracted proceedings were not called for in this case, and should not be called for in the vast majority of cases involving academic decisions. Proper application of the "arbitrary and capricious" standard should enable courts to dispose of most challenges to academic decisions on motions for summary judgment. If a case is properly in court at all, interference with the university's decision is not warranted unless the plaintiff can prove that the decision was devoid of any rational basis or motivated by bad faith or ill will. Ordinarily, the court should be able to decide soon after the action is filed whether the plaintiff has any prospect of meeting this rigorous standard.

Use of summary judgment to resolve actions concerning academic decisions is conducive to the efficient use of scarce

judicial resources. It also recognizes that limits should be placed on the demands made of faculty members who generally will have spent many hours, if not days, on internal university reviews by the time a student files suit. If the plaintiff cannot make a prima facie showing that the university was motivated by personal considerations unrelated to academic performance, the complaint should promptly be dismissed.

II. The Appeals Court's Contract Analysis Ignores the Unique Nature of the University-Student Relationship.

The Court of Appeals held that a property interest protectible under the due process clause arose from the contractual relationship between Ewing and Michigan. The court's analysis, however, ignores the fundamental distinction, well-established in caselaw, between an ordinary commercial contract and the special legal relationship of an educational institution and its students in academic matters.

While the law of contracts sometimes provides a useful framework for analysis of the university-student relationship, "[t]his does not mean that 'contract law' must be rigidly applied in all its aspects . . . The student-university relationship is unique, and it should not and can not be stuffed into one doctrinal category." *Slaughter* v. *Brigham Young University*, 514 F.2d 622, 626 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975).[11] Accordingly, educators have traditionally been ac-

[11] One commentator has observed: "[T]he contract theory seems to misrepresent the intentions of the parties involved. Despite the incorporation of contractual terms in institutional publications, it appears unlikely that either administrators or students view their day-to-day relations as governed by a formal contract." "Developments in the Law — Academic Freedom," 81 Harv. L. Rev. 1045, 1147 (1968).

corded discretion to determine the academic fitness of students within the context of the university-student contractual relationship. *Jansen* v. *Emory University*, 440 F. Supp. 1060 (N.D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978), illustrates the breadth of this discretion. In upholding the university's dismissal of a fourth year dental student, the court observed:

> This Court's decision need not and should not be controlled by a mechanistic application of the law of contract. *Mahavongsanan* [v. *Hall*, 529 F.2d 448 (5th Cir. 1976)] recognizes that educational contracts have unique qualities and are to be construed in a manner which leaves the school sufficient discretion "to properly exercise its educational responsibility." [Citation omitted] 440 F. Supp. at 1062.
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> As long as the decision to dismiss Jansen was essentially academic and neither alleged nor shown to be a pretense to punish him for disciplinary infractions, it is not subject to judicial review as a breach of the educational contract. *Id.* at 1063.

Moreover, unlike other contracts, the terms of the educational relationship are not defined in a formal, integrated agreement. In seeking to determine the intent of the parties, the courts have held that "the standard is that of reasonable expectation — what meaning the party making the manifestation, the University, should reasonably expect the other party to give it." *Giles* v. *Howard University*, 428 F. Supp. 603, 605 (D.D.C. 1977). Accord: *Cloud* v. *The Trustees of Boston University*, 720 F.2d 721, 724 (1st Cir. 1983); *Lyons* v. *Salve Regina College*, 565 F.2d 200, 202 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978).

In certain areas of university life, such as the financial obligations of students, close textual analysis of statements in catalogues may lead to an understanding of a student's "reasonable expectation" and therefore to a definition of the university's obligations. For example, universities may not, absent an express reservation, deviate from the tuition rates stated in their bulletins since this is "one of the most business-like aspects of the student-college relationship, and it is one area where both parties are most likely to expect the stated rules to be binding."[12] Similarly, courts have required universities to follow particular disciplinary procedures set forth in official bulletins, since enforcement of stated procedures does not involve judicial reassessment of expert academic judgments.[13]

By contrast, the courts have repeatedly refused to use isolated passages from catalogues and bulletins to limit colleges' and universities' discretion over academic qualifications. See, e.g., *Hines* v. *Rinker*, *supra*, 667 F.2d at 702-04; *Watson* v. *University of South Alabama College of Medicine*, 463 F. Supp. 720, 726 (S.D. Ala. 1979); *Abrams* v. *Illinois College of Podiatric Medicine*, 77 Ill. App. 3d 471, 395 N.E. 2d 1061, 1065 (1979); *Abbariao* v. *Hamline University School of Law*, 258 N.W.2d 108, 113-14 (Minn. 1977). Indeed, a university whose catalogue reserves to its faculty or administration broad discretion regarding academic advancement of students may foreclose a student from continuing in a graduate program even where the student's grade point average is above the minimum necessary for promotion.[14] The reason for this

[12] Jennings, "Breach of Contract Suits By Students Against Postsecondary Education Institutions: Can They Succeed?," 7 J. Coll. & Univ. L. 191, 220 (1981).

[13] See, e.g., *Tedeschi* v. *Wagner College*, 49 N.Y.2d 652, 404 N.E.2d 1302 (1980); *Kwiatkowski* v. *Ithaca College*, 82 Misc. 2d 43, 368 N.Y.S.2d 973, 980 (Sup. Ct. 1975).

[14] *University of Miami* v. *Militana*, 184 So.2d 701 (Fla. Dist. Ct. App.), *cert. denied*, 192 So.2d 488 (Fla. 1966). See also *Balogun* v. *Cornell University*,

distinction lies in the nature of the student-teacher relationship. In academic matters, a student's expectation is based on a particularized and ongoing type of performance evaluation. Responsible faculty members carefully monitor each candidate's performance and inform the student at regular intervals of his or her progress and qualification for continued study. This ongoing performance evaluation reflects most accurately the student's "reasonable expectation."

It is obvious, in light of these considerations, that the University of Michigan did not breach any contractual obligation to Ewing. Ewing "encountered immediate difficulty" upon entering the Inteflex Program. 559 F. Supp. at 793. By the time of the NBME Part I, he had required six years to complete the course work normally completed in four, failed several courses, received seven incompletes, taken two leaves of absence, been placed on academic probation three times, and been warned repeatedly that any further deficiencies could lead to his dismissal. Under the circumstances, there is no basis to conclude that Michigan led Ewing to believe that he had an unqualified right to retake the NBME Part I.

In fact, just the reverse is true. Ewing continued his enrollment after having been advised that any additional deficiency could result in his dismissal. Ewing cannot claim a reasonable expectation of a right to retake the NBME Part I when at the time he took the exam he was on notice that he was liable to be dropped from registration if he did not improve his performance. Whatever the prior practice may have been with regard to other students, the "contract" between Ewing and Michigan, carried out through the system of periodic counseling and evaluation, reflected the understanding that unsatisfactory

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70 Misc. 2d 474, 333 N.Y.S.2d 838 (Sup. Ct. 1971); *Sofair* v. *State University of New York*, 54 A.D.2d 287, 388 N.Y.S.2d 453 (1976), rev'd on other grounds, 44 N.Y.2d 475, 377 N.E.2d 730, 406 N.Y.S.2d 276 1978).

performance on the NBME Part I could result in removal from the Inteflex Program.

Affirmance of the Sixth Circuit's decision would open the courtroom door to any deficient student alleging that the university's evaluations of some other students impliedly established a minimum standard of performance which the university violated in its treatment of the plaintiff. Such an argument, if permitted as a basis for a breach of contract claim, would embroil the courts in detailed comparison between the plaintiff's academic and personal qualifications and the qualifications of other students in similar programs of study.

Finally, even if the statement in the Michigan promotional brochure concerning reexamination were interpreted literally and given great weight,[15] it would not establish that Michigan breached any terms of its "contract" with Ewing. The pamphlet stated that "qualified medical students" would be given an opportunity to make up a failure on a National Board examination (J.A. 113). Ewing, however, ceased to be "qualified" because of his performance on the NBME Part I. Having been placed on probation and warned that unsatisfactory performance on that examination could be fatal to his continued enrollment, he received a grade so far below passing as to demonstrate that he had only marginal ability in the "hard sciences." (J.A. 72-73).[16]

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[15] The Court of Appeals stated that the brochure was important because irrespective of whether Ewing saw it before taking the NBME Part I, "this pamphlet memorialized the consistent practice of the medical school with respect to students who initially fail that examination." 742 F.2d at 916. However, the evidence showed that students at Michigan had not been allowed to retake the NBME Part I if they had been issued a warning about further deficiencies or were already on probation (J.A. 153).

[16] Ewing's argument that the word "qualified" refers only to the student's status prior to taking the NBME Part I makes no sense. Under Ewing's interpretation, all students who were eligible to take the initial examination would automatically be entitled to reexamination. If the sentence limiting reexamina-

The net effect of affirming the Sixth Circuit's decision would be to increase the judicial role in reviewing academic decisions. Here, as in *Horowitz*, this Court should decline the respondent's invitation to "further enlarge the judicial presence in the academic community." 435 U.S. at 90.

Conclusion.

For the reasons set forth above, the judgment below should be reversed, and the case should be remanded with instructions to enter judgment in favor of the petitioner.

Respectfully submitted,

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tion to only "qualified" students is to have any meaning, it must necessarily be interpreted to take account of a student's performance on the NBME Part I.

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No. 84-1273

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

v.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS AMICUS CURIAE

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS AMICUS CURIAE

This brief is filed on behalf of the American Association of University Professors ("AAUP") with the consent of both parties.

INTEREST OF AMICUS CURIAE

This case raises issues of due process and the role of judicial review of academic decisions, subjects among the central concerns of AAUP. Founded in 1915, AAUP is the nation's oldest and largest organization dedicated exclusively to advancing the interests of professors and research scholars in all academic disciplines. Vigilant in the defense of academic freedom, AAUP has frequently participated in this Court and in the lower courts in cases

raising First Amendment and due process questions,[1] and has on several occasions spoken directly to matters of judicial deference in the resolution of academic litigation.[2]

One of the Association's central functions, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for the protection of academic freedom and other important aspects of university life.[3] Several AAUP-supported statements bear on the instant case. The 1967 *Joint Statement on Rights and Freedoms of Students* was formulated jointly by AAUP, the United States National Student Association, the Association of American Colleges, the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors. Each organization endorsed the *Joint Statement* as have many other professional bodies.[4] The *Joint Statement* provides in pertinent part:

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[1] *E.g., Board of Educ. of the City of Oklahoma City v. National Gay Task Force,* 105 S. Ct. 1858 (1985); *Minnesota State Bd. for Community Colleges v. Knight,* 104 S. Ct. 1058 (1984); *Board of Educ. v. Vail,* 104 S. Ct. 2144 (1984); *Perry v. Sindermann,* 408 U.S. 593 (1972); *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Whitehill v. Elkins,* 389 U.S. 54 (1967); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967).

[2] *Princeton University v. Schmid,* 455 U.S. 100 (1982); *Gray v. Board of Higher Educ.,* 692 F.2d 901 (2d Cir. 1982); *Kunda v. Muhlenberg College,* 621 F.2d 532 (3rd Cir. 1980).

[3] *See* 1940 *Statement of Principles on Academic Freedom and Tenure,* reprinted in AAUP POLICY DOCUMENTS AND REPORTS (1984) and cited, *inter alia,* in *Tilton v. Richardson,* 403 U.S. 672 (1971); *Jimenez v. Aldovar,* 650 F.2d 363 (1st Cir. 1981); *Adamian v. Jacobsen,* 523 F.2d 929 (9th Cir. 1975).

[4] Several cases stemming from campus disturbances of the late 1960s relied in part on the *Joint Statement. Stricklin v. Regents of University of Wisconsin,* 297 F. Supp. 416, 420 (W.D. Wisc. 1969); *Soglin v. Kauffman,* 295 F. Supp. 978 (W.D. Wisc. 1968); *Marzette v. McPhee,* 294 F. Supp. 562 (W.D. Wisc. 1968).

IN THE CLASSROOM

The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.

A. *Protection of Freedom of Expression*

Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.

B. *Protection against Improper Academic Evaluation*

Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.[5]

We suggest below a standard for judicial review of decisions involving the academic standing of students that gives due consideration both to the student's right to be free from prejudiced or capricious evaluation and to the unique competence of professors in judging the academic progress of their students.

AAUP is also a co-sponsor of the *Statement on Government of Colleges and Universities,*[6] formulated in 1966 by AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges. The *Statement on Government* recognizes the primacy of the faculty role in such fundamental areas as

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[5] AAUP POLICY DOCUMENTS AND REPORTS 141, 142 (1984).

[6] *Id.* 105.

"curriculum, subject matter and methods of instruction, . . . and those aspects of student life which relate to the educational process." [7] It goes on to indicate that:

> [t]he faculty sets the requirements for the degrees offered in course, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.

Finally, AAUP's 1966 *Statement on Professional Ethics* stresses the professor's responsibility "to assure that his evaluation of students reflects their true merit." [8] By virtue of its long-standing concern with matters of academic freedom, faculty responsibility, and student rights, AAUP believes it is uniquely situated to address the Court as *amicus curiae.*

SUMMARY OF ARGUMENT

The second question presented for review by the petition for writ of certiorari in this case asks whether, in light of *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 70 (1978), the dismissal of a student from a state medical school for academic deficiencies may "be subjected to substantive due process review and reversal by the federal courts without any regard for the faculty's special expertise." [9] The petition asserts that no substantive due process should be accorded to disputes over student academic standing; then assuming *arguendo* the existence of such review, the petition goes on to argue that faculty judgments are entitled to deference from the courts. Petition for Writ of Certiorari at 15-22. Amicus AAUP submits that the substantive due process protections of the Fourteenth Amendment extend to the academic dismissal of state college and university students. In exercising substantive review, the courts should accord great, but not total, deference to the judgment of faculty members.

[7] *Id.* at 109.

[8] *Id.* at 133.

[9] Amicus AAUP confines its discussion to the second question presented for review and does not address the Eleventh Amendment issues.

Substantive due process review of student academic standing can be undertaken by the courts without excessive interference in the affairs of academic institutions, contrary to the dictum in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978). In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court articulated a standard of substantive due process review that accords great deference to the professional judgments of responsible officials and avoids unnecessary intrusion into the affairs of specialized state institutions. While the setting in *Youngberg* was a mental institution, its holding is fully applicable to higher education. *Youngberg* teaches that the decision of a professional abridging a constitutionally protected interest occasions liability only when the decision "is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. The academic evaluation of students can readily be assessed under this standard. If the exercise of faculty judgment about a student's academic progress falls within generally accepted professional standards, no liability arises. Only in the rare instance where a rational professional basis is lacking for the the academic evaluation of a student should the courts intervene. See *Cafeteria Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961). No trial *de novo* would be required to examine in detail the student's performance. The Fourteenth Amendment requires only that the institution articulate a sound academic reason for its dismissal of the student. *Dunlop v. Bachowski*, 421 U.S. 560 (1975). *See Ponte v. Real*, 53 U.S.L.W. 4539 (U.S. May 21, 1985). With the court's role confined to examination of the institution's statement of reasons, appropriate deference to academic decision-making is preserved.

In view of the yet unsettled factual disputes in this case, amicus AAUP urges the Court to announce the standard of substantive due process review for student academic standing discussed herein, and to remand the case for application of the standard by the lower courts. *See, e.g., Healy v. James*, 408 U.S. 169 (1972).

ARGUMENT

I. THE FOURTEENTH AMENDMENT REQUIRES SUBSTANTIVE DUE PROCESS REVIEW OF STUDENT ACADEMIC STANDING UNDER AN ARBITRARY AND CAPRICIOUS TEST

The instant case provides an opportunity to re-examine the suggestion made in dictum in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 91-92 (1978), that substantive due process review may not extend to the dismissal of students from public colleges and universities on academic grounds. In *Horowitz*, the Court assumed *arguendo* the existence of substantive review and concluded that no showing of arbitrariness or capriciousness had been made.[10] The reluctance to recognize substantive due process review rested on the premise that "[c]ourts are particularly ill-equipped to evaluate academic performance." Id. at 92. Substantive review for disciplinary dismissals is available, but the *Horowitz* dictum suggests that academic judgments are not susceptible to substantive judicial examination. Apart from the difficulty of differentiating dismissals on disciplinary grounds from those on academic grounds in many cases, mechanisms do exist for effective substantive due process review to correct the rare instances in which dismissals on allegedly academic grounds are in fact based on discrimination, ill will, or arbitrary action. Many lower

[10] Separate opinions by Justice Marshall and Justice Blackmun joined by Justice Brennan suggested that the question of substantive due process violation should have been remanded for consideration in the first instance by the court of appeals.

courts have been prepared even after *Horowitz* to safeguard students' interests where necessary through limited inquiry into the appropriateness of decisions concerning academic standing.[11] More significantly, decisions of this Court affirming the existence of substantive review in analogous settings compel the recognition of such review in disputes over student standing. We turn to these cases following a discussion of student and institutional interests.

Most assessment of students is conducted in a conscientious manner by faculty members. Examinations are constructed and graded with care, consistent with the tradition of objectivity and fairness which is deeply ingrained in the academic profession. As *Horowitz* and the instant case both illustrate, systematic counseling and internal grievance procedures are commonly available. From the student's perspective, grades can provide a measure of progress valuable to the intrinsic process of learning. Access to graduate education and to attractive employment opportunities often turns on academic performance. The noted scholar Edward Shils has observed:

> Students must not only be taught. They must also be assessed and they must be assessed fairly by their examiners. The assessment is important because it affects the students' chances in their subsequent studies and in admission to their professional careers.

[11] *Aubuchon v. Olson*, 467 F. Supp. 568, 572 (E.D. Mo. 1979); *Watson v. Univ. of So. Alabama Coll. of Medicine*, 436 F. Supp. 720, 727 (S.D. Ala. 1979). *See Hines v. Rinker*, 667 F.2d 699, 703 (8th Cir. 1981); *Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981). *But see Lavash v. Kountze*, 473 F. Supp. 868 (D. Mass.), *aff'd* 604 F.2d 103 (1st Cir. 1979); *Hubbard v. John Tyler Community College*, 455 F. Supp. 753 (E.D. Va. 1978). *See generally* R. Dessem, *Board of Curators of the University of Missouri v. Horowitz: Academic versus Judicial Expertise*, 39 OHIO ST. L.J. 476 (1978); D. Henderson, *The Law and Academic Evaluation and Dismissal in Higher Education*, 13 CUM. L. REV. 475 (1983); Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95 (1973).

> Assessment also affects the students' attitude towards their studies and towards themselves. Just assessment is as necessary for society as it is for the individual student.[12]

While society has an interest in just evaluation of students, it also has an interest, long recognized in this Court, in preventing infringements on academic freedom. As Justice Powell observed in *Bakke*, the freedom of a university to make its own judgments as to education includes "the selection of its student body." [13] This principle follows from Justice Frankfurter's frequently cited reference to the "four essential freedoms" of the university, among them the right to determine "who may be admitted to study." [14] The right to decide on admissions surely subsumes the right to assess the continuing fitness of students for matriculation.[15] Such academic judgments are grounded on the special competence of faculty members in their disciplines and in evaluating student performance. While abuses in grading are rare and while academic decisions merit protection from excessive

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[12] E. Shils, THE ACADEMIC ETHIC 48 (1983).

[13] *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978). M. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817 (1983).

[14] *Regents of the University of California v. Bakke, supra*, 438 U.S. 265, 312, quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

[15] An early report by an AAUP committee observed:

> The question of the Retention and Promotion of Undergraduates is directly and intimately related to that of selection for admission. So intimate is the relation that, were it possible to achieve a method of selective admission which should serve as a perfect prognostic of later performance, the question of retention and promotion would no longer trouble us. But such infallibility of prediction can never be attained; for human nature does not always fulfill its early promise.

Committee G Report, *The Selection, Retention, and Promotion of Undergraduates*, 12 AAUP BULL. 370, 472 (Oct. 1926).

judicial intrusion, the possibility for abuse in student assessment remains. We submit that the Fourteenth Amendment requires the courts to maintain a limited role in substantive due process review.

Were a faculty member motivated by racial animus to fail all minority students in a class, substantive review would surely be available. Similarly, the professor retaliating against students for the exercise of their First Amendment rights would be accountable for the constitutional violation. The dictum in *Horowitz* cannot conceivably be extended to foreclose review in these circumstances. Even in *Cafeteria Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 898 (1961), where at issue was access by a short order cook to a job in a military installation, the Court confirmed that discriminatory or arbitrary government action will not be tolerated:

> We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist.

Surely students are deserving of at least as much protection and *Horowitz* should not be read to the contrary.[16]

What of the case in which a faculty member, asserting the meaninglessness of grades, randomly fails half of the students in a class? Such a situation presents neither discrimination nor ill will, but rather a standard of assessment that is manifestly unjust to the students directly affected. *Cafeteria Workers* suggests that relief from such arbitrary action is available, a conclusion also to be drawn from the more recent case of *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg* the Court analyzed the substantive due process rights of involun-

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[16] We discuss in Part II the requirement that reasons be articulated to explain the adverse action.

tarily-committed mentally retarded persons under the Fourteenth Amendment to the Constitution. Finding protectible interests, including the right to safe conditions and freedom from bodily restraint,[17] the Court addressed at length the standards for scrutinizing the substance of decisions interfering with those interests. The Court, balancing the needs of mental patients against the state's interest in autonomy and the limits of its resources, repeatedly stressed the deference owed to the professional judgments of those charged with the care of the mentally retarded.[18] Acknowledging the need for some substantive due process review, the Court articulated the standard of deference to be accorded to professional judgments. *Youngberg* suggested that this deference minimized judicial interference in the professional practices of the institutions in question, a consideration no less applicable to institutions of higher learning. The Court stated:

> For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision of the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323. This, then, answers the hypothetical case of the professor who refuses to recognize the validity of any grading system. The marks assigned by such a professor

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[17] The petition for writ of certiorari in the instant case does not appear to challenge the court of appeals' conclusion that Ewing had a constitutionally protected property interest in continuing his medical education. The due process question presented for this Court's consideration concerns only the nature of substantive review of student academic standing.

[18] *See Pacific States Box & Basket Co. v. White,* 296 U.S. 176 (1935) (on deference to administrative agencies.)

would not be based on exercise of professional judgment [19] within the limits of generally accepted professional standards. Despite the manifest differences between mental patients and medical students, *Youngberg* also states the proper standard for resolution of disputes over student academic standing. A faculty determination about academic standing is presumptively valid. The presumption may be overcome only if the faculty decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the decision was not grounded on the exercise of professorial discretion.[20] *Youngberg* stands for the proposition that substantive due process review may be undertaken to protect students from arbitrary injury to their academic standing, without excessive intrusion into the affairs of state colleges and universities. We turn next to the court's role in examining the statement of reasons offered by the institution for the adverse action taken against the student.

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[19] The complaint concerning grading that is most frequently brought to AAUP by faculty members involves the unilateral alteration by an administrator at the institution of a grade determined by the course instructor. Under *Youngberg,* one might argue that the administrator lacks requisite professional competence in grading students in the particular course. Indeed, AAUP standards acknowledge the primacy of the faculty role in grading. *See* page 4 *supra.* While not at issue in the instant case, we note that the concept of judicial deference to academic judgments is grounded on the special competence of faculty members in their substantive areas. Unilateral administrative alteration of a grade attenuates the basis for judicial deference to academic decisions. *See San Diego Community College Teachers Ass'n v. Governing Bd. of the San Diego Community College Dist.,* No. 492817 (Calif. Superior Ct., San Diego, Dec. 21, 1982) (grade unilaterally changed by administration restored to grade originally determined by faculty member).

[20] As described above in the section on the interest of amicus, AAUP plays a dominant role in the development of such standards.

II. SUBSTANTIVE DUE PROCESS IS SATISFIED IF THE INSTITUTION ARTICULATES A SOUND ACADEMIC REASON FOR ITS DISMISSAL OF THE STUDENT

The limited substantive due process review which we urge for student complaints over loss of academic standing requires only that the institution articulate a sound academic reason for the adverse action taken. No exhaustive trial de novo, or scrutiny by the courts of examination papers and the like, would be necessary. The institution's obligation to explain its action flows from several decisions of this Court and need not infringe academic freedom.[21]

Youngberg v. Romeo, supra, 367 U.S. 886 (1961), strongly implies an obligation to provide reasons, without which one could not determine whether the action fell within the bounds of the exercise of professional discretion.[22] In *Cafeteria Workers v. McElroy, supra*, 367 U.S. 886 (1961), the Court looked to the explanation "announced" by the government and found it facially legitimate. With respect to penal institutions, the Fourteenth Amendment requires prison officials to explain why they refused to allow an inmate facing disciplinary charges to call certain witnesses. *Ponte v. Real*, 53 U.S.L.W. 4549 (U.S. May 21, 1985). A comprehensive discussion of the obligation to provide reasons appears in *Dunlop v. Bachowski*, 421 U.S. 560 (1975). *Dunlop* addressed the scope of review under the Administrative Procedure Act of a decision by the Secretary of Labor not to file a civil action for redress of a union's alleged violations of the Labor-Management Reporting and Disclosure Act (LMRDA). The Secretary had exclusive authority to file suit to set aside improper union elections; a union member dissatisfied with the Secretary's decision not to pursue a complaint of election illegality to litigation filed suit against the Secretary. The Court first examined whether judicial review of the Secretary's decision was available at all. Finding no Congressional intent in the LMRDA to prohibit such review entirely, the Court concluded that only review with a narrow and limited scope would comport with the objectives of the statute. The LMRDA enforcement mechanisms rely heavily on the Secretary's special expertise in union matters, an expertise not shared by the judicial branch. The Court drew two basic conclusions about the situation:

> (1) since the statute relies upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect, clearly the reviewing court is not authorized to substitute its judgment for the decision of the Secretary not to bring suit; (2) therefore, to enable the reviewing court intelligently to review the Secretary's determination, the Secretary must provide . . . a statement of reasons supporting his determination.

421 U.S. 571. These principles are readily transferable to the instant case, as courts lack the expertise required to evaluate students. A limited form of review may be undertaken based upon a statement of reasons for the action furnished by the institution. The reasons are entitled to great deference, as explained in *Youngberg*, 457 U.S. 307, provided that the action was based on the reasonable exercise of academic judgment. In *Dunlop*, the reviewing court's role was described in similar terms:

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[21] *See generally* R. Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976). *See also* M. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985); T. M. Scanlon, *Due Process*, in J. Pennock, ed., DUE PROCESS, NOMOS XVIII 93, 97 (1977).

[22] The 1966 *Statement on Government of Colleges and Universities*, quoted *supra* at 4, recognizes the professional role of faculty in determining students' progress in meeting the requirements for degrees, which are also to be set by the faculty.

> Except in what must be the rare case, the court's review should be confined to examination of the "reasons" statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious.

421 U.S. at 572-3. The Court's description of the "rare case" justifying more extensive review included situations where the Secretary completely abrogated his enforcement authority, acted in a constitutionally discriminatory manner, or reached a decision clearly in defiance of his responsibilities. *Id.* at 575. In each of these circumstances the Secretary's reasons would also have failed under the *Youngberg* standard, as the justification would have been based on something other than the exercise of the Secretary's professional discretion. Floodgates of litigation over the academic assessment of students will not be opened under such a stringent standard of review. Rare will be the situation in which a student can show that the adverse academic decision did not rest upon some reasonable exercise of professional discretion but rather lacked any rational foundation.[23] But because the rare instance of serious abuse can occur, the Fourteenth Amendment requires limited judicial scrutiny of the institutional basis for the decision.

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[23] Changes in institutional policy which work to the disadvantage of students may similarly require explanation. The court of appeals focussed in the instant case on the differential treatment of respondent Ewing, which the court found unjustified. As Justice White observed in a different context in *Motor Vehicles Mfr's Ass'n of the United States Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Ewing might argue in the instant case that the University of Michigan apparently changed its rule allowing students a second opportunity to sit for the National Board of Medical Examiners test and that no sound academic reason for the change was articulated.

Institutions may argue that the obligation to articulate sound academic reasons for student dismissals violates rights of academic freedom. Amicus AAUP, as the organization in the forefront of the defense of academic freedom, does not agree. Analogies to statement of reasons in situations of nonreappointment of faculty members are instructive. AAUP standards call for the provision of written notice of reasons for the nonrenewal of a faculty appointment, upon request of the disappointed candidate.[24] The American Council on Education, an organization representing over 1400 institutions of higher education, has similarly called for candidates for faculty advancement to have "the opportunity to know and to benefit from the deliberation of peers."[25] This requirement of providing reasons upon request was expressly endorsed in *Gray v. Board of Higher Education, City of New York*, 692 F.2d 901, 907 (2d Cir. 1982), a race discrimination action in which the confidentiality of deliberations on the nonrenewal of a faculty appointment was at issue. The court in *Gray* concluded that the provision of a statement of reasons for nonreappointment of a faculty member would appropriately inhibit capricious decision-making, and that the requirement of reasons was "consistent with the goals of academic freedom." *Id.* at 909. In commentary supporting the Association's position concerning the statement of reasons for faculty nonreappointment, a noted constitutional scholar drew an analogy to providing reasons for students grades:

> It may be a 'nuisance' to have to explain to a student the basis on which we have assessed his work as

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[24] *Statement on Procedural Standards in Faculty Dismissal Proceedings*, AAUP POLICY DOCUMENTS AND REPORTS 14, 16-8 (1984).

[25] American Council on Education, "Self-Regulation Initiatives: Guidelines for Colleges and Universities, Confidentiality of College and University Faculty Personnel Files: Its Appropriate Role in Institutional Affairs," December, 1981.

"F," but most of us have long since accepted that obligation as part of our commitment.[26]

For an institution to be called upon to offer this explanation in court need not be seen as an onerous burden or one that threatens academic freedom interests.

Apart from the sovereign immunity issues, which we do not address, the resolution of the case would seem to turn in large part on the consistency and adequacy of the explanations offered by the institution for its dismissal of respondent Ewing. The weight to be accorded to the pamphlet, "On Becoming a Doctor," construed in light of past practice, is pivotal. The court of appeals' factual finding that Ewing was "qualified" as the term is used in the pamphlet is also important. Because the courts below took markedly different positions on these questions, amicus AAUP finds the factual record quite unsettled as the case now stands in this Court. AAUP suggests that the Court adopt the standard of substantive due process review urged herein and then remand the case for clarification of the facts and application of the standard.[27] *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584 (1947) (case should present "the underlying constitutional issues in clear-cut and concrete form"). *See Dayton Board of Education v. Brinkman*, 433 U.S. 406, 421 (1977); *Healy v. James*,

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[26] W. Van Alstyne, *Furnishing Reasons for a Decision against Reappointment: Legal Considerations*, 62 AAUP BULL. 285 (Summer, 1976). We do not mean to suggest, however, that a student challenging a single grade is entitled to the same degree of judicial scrutiny as a student challenging his dismissal from registration.

[27] We note that a court finding a substantive due process violation in the academic dismissal of a student should exercise great care in formulating a remedy. Alternatives short of ordering reinstatement should be preferred whenever possible. Remand to the institution for review by a faculty committee, modification of the student's transcript, or, as in Ewing's case, the administration of a repeat examination are among the less intrusive alternatives.

408 U.S. 169, 194 (1972); *Coleman v. Alabama*, 399 U.S. 1 (1970).

CONCLUSION

For the foregoing reasons, amicus AAUP suggests that the Court announce the standard of substantive due process review described herein for cases involving injury to student academic standing and remand the case for further proceedings.

Respectfully submitted,

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No. 84-1273

In the Supreme Court of the United States

OCTOBER TERM, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
PETITIONER

v.

SCOTT E. EWING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether a state medical school's decision to dismiss an academically deficient student is subject to substantive due process review under 42 U.S.C. 1983.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Respondent is a former student at the University of Michigan Medical School who alleges that his dismissal for substandard academic performance violated substantive due process guarantees. The United States has a strong interest in promoting excellence in medical education and in ensuring that due process claims are correctly analyzed.

Congress has declared it "the responsibility of the Federal Government, consistent with the rights, duties,

and privileges of States and institutions of higher education, to promote * * * [the] quality of postsecondary education, including the maintenance and extension of academic freedom, responsibility, and educational diversity." Higher Education Act of 1965, 20 U.S.C. 1001(2)(C). Moreover, Congress has appropriated for fiscal year 1985 approximately $200 million for a variety of health professions grants, including institutional aid and scholarships, under the Public Health Service Act, 42 U.S.C. 201 *et seq.*, to be awarded by the Department of Health and Human Services. That Department will also insure approximately $250 million in student loans during fiscal year 1985 under the Health Education Assistance Loan program. The United States therefore has a substantial interest in the quality of medical education.

Because the federal government, like the states, is bound to observe the requirements of the Due Process Clause, the United States also has an interest in properly defining the scope of due process review. The approach adopted by the court of appeals in this case, particularly its finding of a property interest based solely on ambiguous implied understandings, could greatly expand the instances in which federal decisions are subjected to constitutional scrutiny.

STATEMENT

1. In the fall of 1975, respondent entered a special six-year program at the University of Michigan, leading to an undergraduate degree and a medical degree. Almost immediately, respondent experienced academic difficulties, taking incompletes in two courses his first semester. After experiencing other academic problems during his first year, respondent took a leave of absence for a semester. When he returned, respondent again had academic troubles, taking incompletes in some courses and receiving a failing grade in another. Respondent was placed on academic probation and advised in writing that any further deficiencies would be grounds for dismissal. He subsequently received a deficient grade in a pharmacology course, but he was permitted to take the examination again. Pet. App. 12a-14a.

Six years after admission to the joint degree program, respondent completed the four years of course work required for entry into the two-year clinical phase of the program. Before starting the clinical phase, respondent, like other medical school students, was required to pass Part I of the National Board of Medical Examiners (NBME) test, a two-day multiple choice examination. Respondent not only failed the NBME, he received the lowest score ever recorded by a University of Michigan student. Pet. App. 15a.

The medical school's Promotion and Review Board then voted unanimously to dismiss respondent from the program.[1] Respondent requested reconsideration, and the Board held a hearing. Respondent argued that his poor performance on the NBME should be excused for a number of personal reasons.[2] Respond-

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[1] Promotion and Review Boards determine whether students may advance from one year of study to the next and recommend whether students should graduate. DX36, at 34.

[2] Respondent told the Board that his mother had suffered a heart attack 18 months before the examination; he had broken up with his long-time girlfriend about six months before the examination; he had devoted too much time to writing a paper for an essay contest; he had had to retake the examination in the pharmacology course just before the NBME; and he had panicked during the NBME. Pet. App. 18a-19a.

ent was asked whether he had understood the letter he had received advising him that he was on probation and might be dismissed for further deficiencies. He responded that he had understood the warning, and added that the pressure resulting from being "under the gun" may have contributed to his poor performance on the NBME. The Board again voted unanimously to dismiss him. Pet. App. 17a-20a.

Respondent appealed the Board's decision to the medical school's Executive Committee, requesting a leave of absence so that he could study for and retake the NBME. After meeting with respondent, the Committee unanimously affirmed his dismissal. Pet. App. 15a.

2. Respondent then filed suit in the United States District Court for the Eastern District of Michigan under 42 U.S.C. 1983, seeking injunctive relief and damages.[3] He also alleged state law breach of contract and promissory estoppel claims. Respondent alleged, in his Section 1983 claim, that he had a property interest in his status as a medical school student.[4] Respondent did not claim that he had been deprived of this property interest without procedural

[3] The University moved to dismiss the damages claim on the ground that it was barred by the Eleventh Amendment, and the district court granted that motion. Pet. App. 4a-11a. Respondent did not appeal the dismissal of his damages claim. *Id.* at 29a n.1.

[4] Respondent's complaint alleged that he had "a property right and interest in his continued enrollment * * * created, at least in part, by the Medical School's guidelines, policy and practice * * * that any medical student would be entitled to, at least, one retest of the NBME" (J.A. 15-16). Respondent did not allege that he had been deprived of a liberty interest.

due process. Rather, respondent contended that he had been denied substantive due process because he was not permitted to retake the NBME even though the University had permitted each of the other 40 students who had failed the test between 1975 and 1982 to take it again (J.A. 15-16).

Following discovery and a four-day bench trial, the district court ruled against respondent on all counts (Pet. App. 12a-27a). The district court noted that this Court, in *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978), had left open the question "whether courts can review academic qualification decisions on substantive due process grounds" (Pet. App. 21a).[5] The district court reviewed the post-*Horowitz* cases and concluded that academic dismissals are subject to substantive due process review, but that such review is limited to "whether the decision was based on arbitrary or

[5] In *Horowitz* the Court considered a claim that a student had been denied procedural and substantive due process when she was dismissed from medical school (435 U.S. at 82-91). In assessing the procedural due process claim, the Court found no need to determine whether the student had been deprived of a liberty or property interest because it was clear that her dismissal had been accompanied by fair procedures (*id.* at 84-85).

The Court then addressed the student's substantive due process claim, which rested on her allegation that she had been dismissed in part on account of her sex, religion, and physical appearance (435 U.S. at 92 n.7). It noted that a number of lower courts had assumed that a substantive due process inquiry was appropriate if a plaintiff alleged that, despite procedural fairness, an academic dismissal had been arbitrary and capricious, or lacked a rational basis (*id.* at 91-92). The Court did not have to decide whether that approach was correct, since it concluded that the student in *Horowitz* had not been dismissed arbitrarily (*id.* at 92).

capricious factors which are not reasonably considered to be academic criteria" (Pet. App. 25a). Relying on the Court's admonition in *Horowitz* that judges are "ill-equipped to evaluate academic performance" (435 U.S. at 92), the district court concluded that it should not inquire into the merits of the academic decision itself, but should instead afford the University "the traditional broad range of autonomy" given to academic institutions (Pet. App. 26a). Since respondent did not allege that his dismissal "was based on bad faith, ill will or other impermissible ulterior motives" (*ibid.*), the court dismissed the substantive due process claim brought under Section 1983.

The district court also dismissed respondent's breach of contract and promissory estoppel claims. It concluded that the University's statement in a promotional pamphlet that a qualified student who failed the NBME would be permitted to retake the examination, and the fact that other students had been permitted to retake the NBME, did not amount to an unqualified promise to respondent or give him a contract right to retake the test. The court found in this regard that respondent had not seen the pamphlet that allegedly gave rise to the contract right to retake the NBME. Pet. App. 26a-27a.

3. The court of appeals reversed (Pet. App. 28a-33a). It first addressed the question whether respondent had been "deprived of a constitutionally cognizable right" (*id.* at 30a). The court noted that in *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), this Court held that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law," and that in a companion

case, *Perry* v. *Sindermann*, 408 U.S. 593, 601-602 (1972), the Court held that "agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances' " could be independent sources of property interests. The court of appeals also noted that the Michigan Supreme Court had once stated that two medical school students had "a right * * * resting in contract to be continued as students" (*Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 100, 120 N.W. 589, 591 (1909)). Relying on these cases, the court of appeals concluded that "an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections" (Pet. App. 30a-31a).

The court of appeals next considered whether substantive due process review is applicable in cases involving the deprivation of such a right. Relying on *Stevens* v. *Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981), a post-*Horowitz* decision, the court held that, in an academic dismissal case, "the arbitrary and capricious deprivation of a constitutionally cognizable right does state a valid [cause] of action" under the Due Process Clause (Pet. App. 32a).

Finally, the court of appeals concluded that the University acted "in an arbitrary and capricious manner by not allowing [respondent] a second opportunity" to take the NBME (Pet. App. 33a). In the court of appeals' view, the district court's finding that respondent did not have a contract or promissory estoppel right under state law to retake the NBME was "clearly erroneous" (*id.* at 32a-33a). The court of appeals recognized that the University's Medical School Bulletin was the primary source of any con-

tract terms between the University and respondent, and that the Bulletin grants "broad discretionary power" to Promotion and Review Boards (*id.* at 32a). But the court stated that the terms of the contract were defined not solely by the Bulletin, but also by the statement in a "promotional pamphlet * * * that a qualified student would be given a second chance to take the NBME" and by the "consistent practice of the medical school" of allowing students who failed the NBME to retake the examination (*id.* at 33a).[6] Accordingly, the court of appeals ordered the University to allow respondent to retake the NBME and to reinstate him as a medical student if he passed it (*ibid.*).

SUMMARY OF ARGUMENT

The court of appeals plainly erred in ruling that the Due Process Clause required the University of Michigan Medical School to permit respondent to retake an examination. Respondent's substantive due process claim amounts to nothing more than a claim that the University breached its contract with him. It is wholly inappropriate for federal courts to decide purely contractual disputes under the rubric of substantive due process. Moreover, even if property interests based on contract claims may on occasion give rise to substantive due process review, respondent has not shown that he was deprived of a property interest. Finally, even if respondent had a property interest in his continued status as a medical student,

[6] Although the court of appeals found that the district court's conclusions regarding respondent's contract and promissory estoppel claims were clearly erroneous, it expressly stated that it was not granting relief on the basis of those claims because "this case can be disposed of on the Section 1983 claim" (Pet. App. 30a n.2).

the University complied with due process in ordering respondent's dismissal. It is undisputed that respondent was given notice and an opportunity for a hearing prior to his dismissal and that he was dismissed solely for academic reasons; the district court correctly concluded that it is not the role of the federal courts to second-guess such academic determinations.

ARGUMENT

RESPONDENT'S DISMISSAL FROM MEDICAL SCHOOL FOR ACADEMIC DEFICIENCIES DID NOT VIOLATE SUBSTANTIVE DUE PROCESS GUARANTEES

A. Respondent Was Not Deprived Of An Interest Warranting Substantive Due Process Review

Before discussing the question whether the University acted arbitrarily and capriciously in dismissing respondent from medical school for substandard academic performance, we wish to note two aspects of the court of appeals' decision that, while perhaps not expressly challenged by petitioner, seem erroneous. First, we question whether it is appropriate to allow respondent to turn what is essentially a state common law claim that the University breached its contract into a federal constitutional claim that the University, by breaching the contract, deprived respondent of property without substantive due process. Second, even if respondent's grievance properly falls within 42 U.S.C. 1983, we question whether the court below correctly concluded that he had a property interest in his continued attendance at the medical school on the basis of implied understandings and vague language in school promotional pamphlets.

1. Property interests, the deprivation of which requires procedural protections consistent with the Due

Process Clause, are not created by the Constitution, but are instead derived from independent sources such as state law. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Substantive due process rights, in contrast, are created by the Constitution. Respondent contends in essence that he had a contract with the University containing an implied term permitting him to retake the NBME if he failed, and that the University breached this contract by dismissing him rather than permitting him to retake the examination. Apart from this essentially state law claim, he does not allege the violation of any constitutional right. Because no provision of the Bill of Rights protects against breaches of contract, we seriously doubt whether substantive due process provides an appropriate basis for a claim in this case.

The Seventh Circuit recently recognized this point in *Brown* v. *Brienen*, 722 F.2d 360 (1983). The plaintiffs were public employees who alleged that their contract right to compensatory time off had been breached. After rejecting the plaintiffs' procedural due process claim, the court turned to their charge of a substantive due process violation. It stated that " '[s]ubstantive due process' is a shorthand for the fact that the Supreme Court has interpreted the due process clause of the Fourteenth Amendment to confer certain substantive rights based mainly on the Bill of Rights," adding that "there is nothing in the Bill of Rights about protecting contractual rights as such" (*id.* at 366-367). Accordingly, the Seventh Circuit summarily dismissed plaintiffs' substantive due process claim.[7]

[7] The court added: "[W]e express no view of the merits of their contract claims, which they are free to pursue in state court" (722 F.2d at 367).

Besides conforming to the teachings of this Court's substantive due process cases, this approach is quite sensible. At bottom, all that respondent has alleged is a breach of contract. The court of appeals acknowledged as much by holding, as part of its substantive due process analysis, that the district court's rejection of respondent's state law contract and promissory estoppel claims was "clearly erroneous" (Pet. App. 33a). The court of appeals then went on to conclude that the University's breach was "arbitrary and capricious" (*ibid.*), but this conclusion adds nothing analytically—and was not intended to add anything—to the simple holding that, in the court of appeals' view, respondent's contract claim was well founded.

It makes little sense to "constitutionalize" breach of contract disputes in this manner. Cf. *Paul* v. *Davis*, 424 U.S. 693, 701 (1976) (refusing to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States"); *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981) (same). If respondent and the University in fact had a contract with an implied term permitting him to retake the NBME, then the University breached that contract, and respondent should prevail in a suit for breach of contract in state court. On the other hand, if respondent cannot prevail in a breach of contract action, then there is no basis for concluding as a matter of federal constitutional law that the University arbitrarily and capriciously denied him permission to retake the NBME. There is, in short, no warrant for federal courts to decide breach of contract claims in the guise of sub-

stantive due process analysis.[8] Indeed, it is especially inappropriate for federal courts to instruct arms of state governments to abide by state contract law, where, in reality, there is no independent claim of infringement of a federally-protected right. Cf. *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984).[9]

2. Respondent's claim also lacks merit because he has not shown that he was deprived of a property interest.[10] For respondent's claimed interest in his student status to fall within the protections of the Due Process Clause, respondent must show that he had "a legitimate claim of entitlement to" that status and not simply a "unilateral expectation" or an "abstract need or desire" to be allowed to pursue his

[8] While we do not believe that breach of contract claims should be subject to substantive due process review, rights created by contract—if they amount to a "property" interest—are of course subject to procedural due process protections. See, *e.g.*, *Board of Regents* v. *Roth*, *supra*; *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Respondent does not contend that his procedural rights were violated by his dismissal from medical school. See Pet. 15 n.15.

[9] This would be a different case if respondent alleged that he was deprived of a property interest, derived from a contract, because he had exercised a right protected by the Constitution. In such a case substantive due process review would be warranted.

[10] This Court has found property rights in diverse interests such as retention of government employment (see, *e.g.*, *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985)), receipt of government benefits (see, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)), and attendance at public school (*Goss* v. *Lopez*, 419 U.S. 565 (1975)). Nonetheless, "the range of interests protected by procedural due process is not infinite." *Roth*, 408 U.S. at 570; *Ingraham* v. *Wright*, 430 U.S. 651, 672 (1977).

medical studies, derived from a source such as state law. *Roth*, 408 U.S. at 577.[11]

There is no suggestion that any Michigan statute or regulation grants medical students the equivalent of "tenure." Rather, the applicable source of state law here would appear to be the University's Medical School Bulletin, which clearly states that Promotion and Review Boards have full authority to decide whether a student may advance from one year to the next (DX36, at 34). The Bulletin does not provide that dismissals may only be made for cause or that any particular level of academic deficiency must be demonstrated. To the contrary, the Bulletin states that "Promotion Boards can, *at their discretion*, approve advancement, require the student to repeat all or part of a year's work, refuse further registration, or take whatever action they may deem appropriate

[11] The court of appeals did not define its inquiry as directed to whether respondent had a property interest in his status as a medical school student. Rather, it held only that "an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections" (Pet. App. 31a). This confusing statement appears to result from a misreading of *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978). The court of appeals merged the protected interest analysis—which relates to whether the Due Process Clause is *implicated*—with the arbitrary and capricious analysis—which relates to whether the Due Process Clause is *violated*—in order to reach its conclusion that respondent possessed a "property interest" in "not be[ing] arbitrarily dismissed." In short, the court seems to have held that respondent had a "property" interest in not being discharged from medical school without being allowed to retake an examination. This is a different sort of "property" interest than this Court has previously identified.

in an individual instance" (*ibid.* (emphasis added)).[12] The Bulletin, "having no definitions, no criteria, and no mandated 'shalls,' creates no analogous duty or constitutional entitlement." *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 466 (1981). Under the terms of the Bulletin, therefore, medical school students at the University of Michigan are analogous to employees whose jobs are terminable at will, as in *Board of Regents* v. *Roth*, *supra*, and *Bishop* v. *Wood*, 426 U.S. 341 (1976), rather than employees with "common law" tenure rights, as in *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Hence, respondent has not shown that he possessed a property interest in his status as a student.[13]

The court of appeals gave short shrift to the actual language of the Medical School Bulletin. It instead concluded that the terms set forth in the Bulletin were modified by a medical school promotional pamphlet and by an alleged practice of permitting failing students to retake the NBME (Pet. App. 32a-33a). But the statement in the pamphlet is clearly insufficient to modify the unambiguous terms described in

[12] The Bulletin also provides (DX36, at 34) that a student may ask a Board to reconsider its decision and may appeal that decision to the Executive Committee, as respondent did. The fact that the University permits students to question the discretionary decision of Promotion Boards through the procedures described in the Bulletin does not create a property interest. *Olim* v. *Wakinekona*, 461 U.S. 238, 249-250 (1983).

[13] This Court found that the students suspended in *Goss* v. *Lopez*, *supra*, had been deprived of property interests. But those property interests were firmly based on an Ohio statute providing a right to a free, public education to Ohio school children, as the Court repeatedly emphasized (419 U.S. at 567, 573-574). Respondent has pointed to no Michigan statute providing a right to a medical education.

the Bulletin.[14] Likewise, the medical school's decisions to permit other students to retake the NBME did not establish a "common law" right of every flunked student to take the examination a second time, regardless of other circumstances. See *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. at 465.[15]

[14] The pamphlet (excerpted at J.A. 113-114) appears to have been designed to reduce the fears of potential applicants about the stresses of medical education. For example, the page after the article relied upon by respondent asks: "Can medical school spoil your fun?" (PX3, at 31). The article relied upon by respondent is a report of an interview with an assistant dean who claimed that the faculty had done away with "rites of passage" and the "basic training" mentality of medical education (*id.* at 30). It is in that context that the pamphlet quotes the assistant dean as saying that "everything possible is done to keep qualified medical students in the Medical School," which "even extends" to retaking the National Boards (*ibid.*). The district court expressly found (Pet. App. 26a-27a) that respondent had not learned of the pamphlet's contents before taking the NBME. Even if he had, we doubt that he reasonably could have believed that its contents were implied contract terms.

[15] In *Perry* v. *Sindermann*, *supra*, the Court held that the respondent, a teacher at a university with no formal tenure system, could attempt to prove that he had "*de facto* tenure" resulting from an implied contract and a "common law" practice (408 U.S. at 599-603). In *Perry*, however, the respondent pointed to his college's official Faculty Guide, which stated that "[t]he Administration of the College wishes the faculty member to feel that he has permanent tenure" (*id.* at 600). In addition, official guidelines provided that the respondent could be dismissed only for cause (*id.* at 600-601 & n.6). In this case, respondent can point to no such statements establishing an implied right to continued enrollment at the medical school. We note, moreover, that the court of appeals did not mention the fact that 19 students were dismissed

Since resolution of this issue requires factual analysis, and since other grounds for reversal are plainly available, the Court need not reach the question whether respondent had a property interest in continued enrollment at the medical school. See also Pet. 20. As in *Horowitz* (435 U.S. at 84-85), the Court may assume the existence of a protected interest for purposes of considering whether the University's deprivation of that interest violated due process. It is to that question we now turn.

B. Respondent's Dismissal From Medical School For Academic Reasons Was Not Arbitrary Or Capricious

The court of appeals clearly erred in concluding that the University acted arbitrarily and capriciously in dismissing respondent from medical school. Respondent's unimpressive academic record speaks for itself. As noted above, his school history was marked by a consistent pattern of withdrawals, warnings, incompletes, and course and examination failures. Nor is there any question that respondent received all the process due him. He was advised in writing that he was on probation and might be dismissed. After his dismal performance on the NBME, respondent was permitted to present his case to the Promotion and Review Board and to appeal its decision to the Executive Committee. Indeed, respondent makes no claim that he was denied procedural due process.

The court of appeals instead found that respondent had been denied substantive due process. Specifically, the court found that "the University treated [respondent] in an arbitrary and capricious manner by not allowing him a second opportunity to take Part I of the NBME" (Pet. App. 33a). This decision was arbitrary because "[respondent] was a 'qualified' student" and because "it was the consistent practice of the University * * * to allow a qualified medical student who initially failed the NBME Part I an opportunity for a retest" (*ibid.*).

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from respondent's program between 1975 and 1982 without being permitted to take the NBME (J.A. 165-166)—a fact that undermines any assertion that there was a "common law" right to retake the test.

Even accepted on its own terms, the court of appeals' ruling (which sounds more in equal protection than substantive due process) is indefensible. In focusing narrowly on the fact that all 40 other students who failed the NBME between 1975 and 1982 were permitted to retake the examination, the court of appeals overlooked the fact that 19 students had been dismissed from respondent's program during that period without being permitted to take the NBME (J.A. 165-166). Furthermore, only one other student in respondent's program failed the NBME while on probation. That other student's excuse for his poor performance—he suffered an epileptic seizure during the examination (Reed Dep. at 168-169)—is clearly more substantial (or, at least, of a far different nature) than respondent's excuses (see note 2, *supra*). In short, there was nothing unfair, much less arbitrary and capricious, about respondent's dismissal.

But there is a far more fundamental flaw in the court of appeals' substantive due process analysis. A federal court simply has no warrant, in the guise of substantive due process review, to second-guess the good-faith academic decisions of university faculty and administrators. Instead, we agree generally with the district court's conclusion that academic dismissals should be reviewable, at most, "only * * * to scrutinize the objective factors which may have tainted or otherwise affected the decision, and not the

propriety of the decision itself" (Pet. App. 25a).[16] Thus, if a dismissed student had some plausible support for a claim that his dismissal was actually based on "impermissible ulterior motives" (*id.* at 26a), a court could consider whether the student's academic record warranted dismissal or whether, in fact, the academic reasons were pretextual. Cf. *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978). Here, however, respondent has not even alleged a non-academic reason for his dismissal. As the district court found (Pet. App. 26a), "[t]here have been no allegations offered to the effect that [the University's] decision was based on bad faith, ill will or other impermissible ulterior motives. The evidence demonstrates that the decision to dismiss [respondent] was reached in a fair and impartial manner, and only after careful and deliberate consideration. * * * [T]he [University] had good reason to dismiss [respondent] from the program."

This approach is fully consistent with this Court's decision in *Horowitz*. The Court there noted that a "graduate or professional school is * * * the best judge of its students' academic performance and their ability to master the required curriculum" (435 U.S. at 85-86 n.2). In contrast, "[c]ourts are particularly ill-equipped to evaluate academic performance" (*id.* at 92). For that reason, the Court

[16] In practice, the differences between our primary contention—that substantive due process review is warranted only where a plaintiff alleges that his dismissal infringed rights protected by the Constitution—and the district court's position—that academic dismissals should be reviewed by the courts only where a plaintiff alleges that the dismissal was actually motivated by non-academic factors—are slight. Only where a plaintiff alleges that his dismissal was motivated by an arbitrary, non-academic reason not related to the plaintiff's fundamental rights would the results vary.

warned against "judicial intrusion into academic decisionmaking" (*ibid.*). This admonition is especially appropriate in a case involving a medical school, where technical issues may well be involved in evaluating a student's competence. See *Hines* v. *Rinker*, 667 F.2d 699, 704 (8th Cir. 1981).

The federal courts have long recognized that they should not review academic decisions. As the court stated in *Connelly* v. *University of Vermont*, 244 F. Supp. 156, 160 (D. Vt. 1965), after analyzing the prior cases:

> The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies, and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness or bad faith. The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals.

We agree with these sentiments, and with petitioner and amici, that intrusive judicial review of academic decisions would be counter-productive. Society's interests—in producing qualified doctors, or engineers, or English teachers—would best be served by leaving academic decisions to academic experts.

Finally, we note that this litigation, ostensibly involving only a mundane claim of breach of contract, in fact threatens the University's interest in academic freedom. This Court has recognized that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First

Amendment" (*Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)). See also *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result). Discretion to decide, on the basis of academic factors, which students should advance and which students should be dismissed is surely a judgment that is central to the interests protected by academic freedom. Cf. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) ("The freedom of a university to make its own judgments as to education includes the selection of its student body."). It would be ironic indeed if these vital constitutional interests were to be sacrificed in the name of substantive due process review, which is designed to protect against violations of the Bill of Rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* Acting Solicitor General Fried is disqualified in this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

v.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN FEDERATION OF TEACHERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN FEDERATION OF TEACHERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

This brief, *amici curiae*, is jointly filed by the National Education Association (NEA) and the American Federation of Teachers (AFT) with the consent of the parties, pursuant to Rule 36.2 of the Court.

STATEMENT OF INTEREST

The National Education Association and the American Federation of Teachers are nationwide employee organizations with a combined membership of over 2.25 million members, the vast majority of whom are employed in public educational institutions. One of the principal purposes of the NEA and the AFT is to pro-

tect the constitutional and statutory rights of teachers, professors and other educational employees, including their right to be free from arbitrary and capricious governmental action.

Because the Court is being asked to decide issues of importance to the effective vindication of individuals' constitutional rights and the effective protection of constitutional property interests, amici have a substantial interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, brought pursuant to 42 U.S.C. § 1983, presents the question whether a state university's decision to dismiss a student who possesses a property interest in continued enrollment is subject to review under the Due Process Clause to determine whether the state's decision is arbitrary and capricious.

There is no question that respondent Ewing has a property interest in continued enrollment in the University of Michigan Medical School. The District Court and the Court of Appeals both so held, relying on the nature of the relationship under Michigan law between a duly admitted student and a university. As the Sixth Circuit explained, the Michigan Supreme Court has held that "when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom. . . . There is no good reason why the law should not recognize, as growing out of [the] relations [between students and a university], a right . . . resting in contract to be continued as students . . . ." *Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 99-100, 120 N.W. 589 (1909), *quoted in* Pet. App. 31a.[1]

[1] Accord, *Maitland* v. *Wayne State University Medical School*, 76 Mich. App. 631, 257 N.W.2d 195 (1977); *cf. Dietz* v. *American Dental Association*, 479 F. Supp. 554 (E.D. Mich. 1979) (applying Michigan law to review substantively the certification decision of a professional association).

This Court has ruled that property interests are created by just such "implied contracts," *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976), and "mutually explicit understandings," *Perry* v. *Sindermann*, 408 U.S. 593, 601-02 (1972). See *Jago* v. *Van Curen*, 454 U.S 14, 17-18 (1981); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Indeed, we do not understand petitioner to have questioned the existence of Ewing's property interest in continued enrollment in the courts below, see J.A. 21, or to have presented that question for this Court's review, see Pet. for Cert. at 20 & n.20. In any event, as this Court has previously ruled, the concurrent readings of a district court and a court of appeals as to the existence of a property interest are "sufficient to foreclose [this Court's] independent examination of the state-law issue." *Bishop* v. *Wood*, *supra*, 426 U.S. at 347.[2]

Even though Ewing has a property interest in continued enrollment, the Solicitor General argues (United States Br. at 9-12), and petitioner Regents suggests (Pet. Br. at 33-37), that Ewing's property interest is entitled only to the procedural protections of due process. The Solicitor General contends that, because respondent's

[2] The Solicitor General concedes that the existence of a property interest may not have been "expressly challenged by petitioner" (United States Br. at 9), but nevertheless questions whether Ewing possesses a property interest in continued enrollment (*id.* at 12-16). The Solicitor General wholly ignores the basis of the Sixth Circuit's holding of a property interest: the Michigan Supreme Court's recognition of a legally enforceable implied contract between a student and a university. It is that relationship, recognized under state law as "an implied understanding that [a student] shall not be arbitrarily dismissed," *Booker* v. *Grand Rapids Medical College*, *supra*, 156 Mich. at 100, that the Sixth Circuit found to create the property interest at stake here, and *not*—as the Solicitor General asserts—an improper "merge[r]" of "protected interest analysis" with "arbitrary and capricious analysis." (See United States Br. at 13 n.11)

property interest does not flow from the Bill of Rights, the Due Process Clause does not protect that interest from arbitrary and capricious deprivation. We submit this brief to refute the Solicitor General's constitutional analysis.

As we show, this Court's decisions establish that the Due Process Clause, at bottom, protects individuals against arbitrary governmental action that deprives them of life, liberty or property. Due process is not satisfied merely by providing notice and a hearing if the government only goes through the motions and then renders a decision that is irrational or without factual support. Thus, in the case presented here, the fact that Ewing was afforded constitutionally adequate procedures does not immunize the Regents' action from review under the Due Process Clause to determine whether that action was arbitrary and capricious.

Nor does the fact that state law may provide a similar or parallel remedy for the infringement of interests protected by the Due Process Clause preclude the application of such substantive analysis. The Due Process Clause, as implemented through section 1983, provides an independent federal basis for challenging deprivations of constitutionally protected property interests. The Court of Appeals was therefore correct in holding that the substantive aspects of the Due Process Clause prohibit petitioner Regents from depriving Ewing of his property interest in continued enrollment on the ground that he had failed the NBME Part I examination if, as that court concluded, the Regents' action was "arbitrary and capricious." Pet. App. 31a.

ARGUMENT

THE DUE PROCESS CLAUSE AFFORDS SUBSTANTIVE PROTECTION AGAINST THE DEPRIVATION OF AN INDIVIDUAL'S PROPERTY INTERESTS BY ARBITRARY AND CAPRICIOUS GOVERNMENTAL ACTION.

The decisions of this Court have repeatedly recognized the central importance of the Due Process Clause in protecting individuals from the wrongful deprivation of their fundamental interests in life, liberty, and property. As the Court reiterated only last Term, "[t]he touchstone of Due Process is freedom from arbitrary governmental action." *Ponte* v. *Real*, —— U.S. ——, 105 S. Ct. 2192, 2195 (1985). Accord, *e.g.*, *Slochower* v. *Board of Education*, 350 U.S. 551, 559 (1956). And, in applying the Due Process Clause to interests in "property," the Court has explained: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The Due Process Clause thus stands guard against arbitrary actions which undermine the "legitimate claim[s] of entitlement" that form the basis for constitutional property interests. *Ibid.*

In applying these principles, the Court has not limited its review of governmental actions that deprive individuals of property interests only to the procedures that accompany those actions. For example, in *Harrah Independent School District* v. *Martin*, 440 U.S. 194 (1979), the Court concluded that a tenured teacher, who possessed a property interest in continued employment, had been "accorded the usual elements of procedural due process" in her dismissal from employment. *Id.* at 197. The fact that the school district had provided procedural due process, however, did not end the Court's due process inquiry. Instead, the Court turned to "the 'substantive

aspects' of 'life, liberty, and property' " in its evaluation of the teacher's claim. *Id.* at 198. After reviewing the relevant facts, the Court ruled that the basis for the school district's decision to dismiss the teacher was not "arbitrary," but the Court did not doubt that the teacher's "claim of a denial of substantive due process" was properly presented and warranted the Court's scrutiny. *Id.* at 199.

Similarly, in *Barsky* v. *Board of Regents*, 347 U.S. 442 (1954), the Court reviewed New York's disciplinary action against a licensed physician as a claimed deprivation of "property without due process of law." *Id.* at 454. The Court did not question the sufficiency of the state's statutory procedures, but addressed instead the question whether "the Board of Regents or the recommending committees [had] made an arbitrary and capricious decision or [had] relied upon irrelevant evidence." *Id.* at 455; accord, *id.* at 456 ("we see no reason to conclude that the board . . . acted arbitrarily, capriciously or through prejudice and deprived appellant of due process of law"). And, in *Wieman* v. *Updegraff*, 344 U.S. 183 (1952), the Court held invalid on substantive due process grounds a loyalty oath that barred individuals from state employment based on their organizational memberships, regardless of the individuals' knowledge of the organizations' purposes: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. . . . [C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 191-92.

The Court has followed a similar approach under the "liberty" prong of the Due Process Clause. Thus, the Court has ruled that the Due Process Clause "affords not only a procedural guarantee against the deprivation of 'liberty,' but likewise protects *substantive aspects* of liberty against unconstitutional restrictions by the State." *Kelley* v. *Johnson*, 425 U.S. 238, 244 (1976) (emphasis

added). And the Court has recently held that the deprivation of a prisoner's liberty interest in "good time credits" requires not only that constitutionally adequate procedures be followed, see *Wolff* v. *McDonnell*, 418 U.S. 539, 563-67 (1974), but also that a revocation of good time credits be supported substantively by "some evidentiary basis for [the] decision" and "have some basis in fact." *Superintendent, Massachusetts Correctional Institution* v. *Hill*, —— U.S. ——, 105 S. Ct. 2768, 2774 (1985). See also *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

In short, the Court's decisions teach that, where a property or liberty interest is involved, the Due Process Clause not only requires "some kind of a hearing," *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 569-70 & n.7, but also requires that the state's decision to deprive an individual of that property or liberty interest be nonarbitrary—*i.e.*, that the state's factual determinations be based upon evidence adduced at the hearing, and that the state's ultimate decision rest on rational considerations. Absent these "substantive" requirements, the procedures mandated by Due Process could easily become meaningless gestures, and the Clause would fail of its central pupose: to guard against governmental arbitrariness.[3]

Ignoring this precedent, the Solicitor General argues that the Due Process Clause provides no basis to review the question whether the Regents' deprivation of Ewing's property interest is arbitrary and capricious. The Solicitor General makes two related contentions. First, the Solicitor General contends that the Due Process Clause

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[3] It is arguable that the requirement that a state engage in rational decisionmaking before it may deprive an individual of liberty or property is actually an aspect of *procedural* due process. *Cf. Jackson* v. *Virginia*, 443 U.S. 307, 314 (1979). Nonetheless, because the parties and the courts below have treated this as a substantive issue, we do likewise.

provides only procedural protections for property interests which are grounded in state law, and that the substantive aspects of due process apply only to interests which are bottomed on the Bill of Rights and encompassed within the term "liberty." (United States Br. at 9-10) Second, the Solicitor General contends that because state law presumably provides a remedy for breach of contract, the Due Process Clause should not afford a federal remedy for arbitrary and capricious deprivation of a property interest that is grounded in an implicit contract. As we now show, neither contention has merit.

1. Plainly, the language of the Due Process Clause admits of no distinction between the protections afforded to "liberty" and those afforded to "property." The Due Process Clause provides "not only a *procedural* guarantee against [a] deprivation . . ., but likewise protects *substantive* aspects" of the interest, *Kelley* v. *Johnson*, *supra* 425 U.S. at 244 (emphasis added), and that is as true for property interests as it is for liberty interests.[4] The Solicitor General's suggestion to the contrary—that substantive protection applies only to liberty interests derived from the Bill of Rights and not to property interests rooted in state law—is made from whole cloth. Notably, the Solicitor General relies on no decision of this Court in support of his radical proposition. Instead, the Solicitor General cites to a single decision by the United States Court of Appeals for the Seventh Circuit, *Brown* v. *Brienen*, 722 F.2d 360 (1983)—a decision which, like

[4] This is not to say that the constitutional question posed by an alleged deprivation of a right secured by the Bill of Rights is identical to the question posed by the deprivation of a property or liberty interest granted to an individual by state law. Where freedom of speech or religion or one of the other freedoms secured by the Bill of Rights is concerned, the Constitution obviously demands more than that the state act non-arbitrarily. But as we show in text, even where "only" a state-created property or liberty interest is at issue, the Constitution demands more than that the state follow the correct procedures before depriving an individual of such an interest.

the Solicitor General's brief, neither cites nor discusses this Court's decisions concerning the substantive aspects of the Due Process Clause.

Moreover, as this Court's precedents establish, the Solicitor General's contention is simply wrong. This Court has reviewed on substantive grounds the deprivation of "liberty" interests that derived *not* from the Bill of Rights but from the terms of state law.[5] And this Court has repeatedly applied the substantive aspects of due process to property interests grounded in state law to judge whether the deprivations of those interests were arbitrary and capricious. See *supra* pages 5-7.

When considered in light of the grand purposes of the Due Process Clause, this result comes as no surprise. "The touchstone of Due Process is freedom from arbitrary governmental action," *Ponte* v. *Real*, *supra*, 105 S. Ct. at 2195—whether that arbitrary action deprives an individual of life, of liberty, or of property. Constitutionally adequate procedures, of course, are an important means to that end, *e.g.*, *Goss* v. *Lopez*, 419 U.S. 565, 583-84 (1975); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring), but in and of themselves proper procedures cannot guarantee freedom from arbitrary deprivations of protected interests. If, for example, petitioner Regents determined to dismiss students because they were left-handed or because they had blond hair,

[5] In *Superintendent, Massachusetts Correctional Institution* v. *Hill*, for example, the liberty interest at stake was a prisoner's statutory right to good time credits that might reduce the term of imprisonment. 105 S. Ct. at 2770-71. That interest, while grounded in an interest in freedom from bodily restraint, existed as a cognizable "liberty" interest only because Massachusetts law had limited the discretion of prison officials to shorten or lengthen a lawful prison sentence, and not as a result of any part of the Bill of Rights. *E.g.*, *Jago* v. *Van Curen*, *supra*, 454 U.S. at 21; *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 466-67 (1981).

such action would be the epitome of governmental arbitrariness. No amount of procedures, designed to ascertain whether in fact a student was left-handed or had blond hair, could make the Regents' action rational and non-arbitrary. In these circumstances, the "substantive aspects" of the Due Process Clause would apply, and the governmental action would properly be ruled invalid no matter how extensive the procedural protections that had been made available.

2. The Solicitor General points to nothing in the language or the purpose of the Due Process Clause that would justify overturning this Court's due process precedents. Instead, the Solicitor General suggests only that where state law provides a remedy for violation of contract rights, "[i]t makes little sense" to provide as well the opportunity for federal review of whether the corresponding deprivation of a property interest is arbitrary and capricious. (United States Br. at 11). The Solicitor General's policy argument comes too late. The Framers of the Fourteenth Amendment determined that the federal Constitution should protect against deprivations of property that are without due process, without regard to the remedies that are available under state law to redress the deprivation. Similarly, the Congress that enacted section 1983 decided that individuals should have free access to the federal courts to remedy such deprivations, again without regard to the availability of state-law remedies. *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 506-07 (1982); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). In short, the reason for the availability of federal review of due process claims is simple: "A federal remedy is provided because the interest asserted by the plaintiff is important enough to be protected by the federal Constitution." Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 22 (1980).[6]

[6] The Solicitor General's implicit suggestion that no constitutional violation exists if state law provides an action for contract damages

Moreover, the implicit assumption underlying the Solicitor General's contention—that state contract law and federal due process law provide duplicate remedies for identical wrongs—is incorrect. The existence of a concurrent state-law remedy for unlawful governmental action that is also an arbitrary deprivation of a property interest does not necessarily render the state-law claim and a section 1983 action coterminous. Ordinarily, state courts adjudicating a state-law property or contract claim will not care in the slightest about the reasons for the governmental action; the state-law issue will be whether the state or municipality was privileged to act as it did. In contrast, the issue presented under the substantive aspects of the Due Process Clause is whether the governmental action is arbitrary and capricious. The federal claim turns entirely on the reasons, or the lack of reasons, why the state or municipality took the challenged action.[7]

is preposterous. When a property interest exists, state law regularly provides a remedy of some form for the deprivation of that interest. Property interests are defined, after all, as "legitimate claim[s] of entitlement" "stem[ming] from an independent source such as state law." *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577. But the existence of a state-law remedy does not replace or eliminate the protections of the Due Process Clause. An arbitrary deprivation of a property interest becomes no less offensive to the Constitution merely because it is also a violation of state law.

[7] In this case, respondent Ewing's property interest presents the unusual situation in which the contract breach and the substantive due process violation are identical. By its nature, Ewing's state-law interest does not protect against *all* dismissals from the University, but yields only a legitimate expectation that he will not be dismissed "arbitrarily." *Booker* v. *Grand Rapids Medical College*, *supra*, 156 Mich. at 100; Pet. App. 31a. Thus, by the purest coincidence that state law mirrors the Constitution in this case, Ewing has a valid contract claim only if he also has a valid substantive due process claim. This does not mean, as the Solicitor General suggests (United States Br. at 11), that substantive due process has "constitutionalized" Michigan contract law; rather, Ewing's contract rights under Michigan law are so limited as to be coter-

Thus, a state may provide some substantive grounds for challenging the deprivation of property or contract rights, yet not the ground which triggers due process protection—*viz.*, that the governmental action was arbitrary and capricious within the meaning of the federal Constitution.[8] Conversely, there will be instances in which state law provides a remedy for the loss of state-law interests, yet no federal remedy is available because the deprivation of the corresponding property interest was not arbitrary.[9]

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minous with his federal constitutional right not to be deprived of property arbitrarily.

[8] In addition, as Justice Harlan recognized in *Monroe* v. *Pape*, the relief available under state law may be inadequate to remedy violations of the Constitution:

> There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right . . . . It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

365 U.S. at 196 n.5 (Harlan, J., concurring). See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) (action for negligence of a state official insufficient remedy for loss of property interest in state-law cause of action for discrimination); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978) (post-termination suit for damages or post-payment action for refund inadequate remedies for loss of property interest in continued utility service).

[9] An "explicit contractual provision" entered into between an individual and a municipality, for example, creates a "legitimate claim of entitlement" under state law, and hence a constitutional property interest. *Perry* v. *Sindermann*, *supra*, 408 U.S. at 601. The municipality's breach of that provision will commonly give rise to a right under state law to recover contract damages, without regard to the reasons, or lack of reasons, for the breach. *E.g.*, *Restatement (Second) of Contracts* § 235(2) & comment b (1979). But the existence of a rational reason for the breach (*e.g.*, that the municipality no longer required the goods or services called for in the contract) would preclude municipal liability under section 1983. Only if the municipality's breach were arbitrary and capricious—presumably a rare occurrence—would there also be a deprivation of property without substantive due process.

In sum, the existence of state-law claims and remedies—which may or may not mirror those available under the Due Process Clause—neither displaces nor precludes the independent federal basis for challenging deprivations of constitutionally protected property interests as being arbitrary and capricious. The Court of Appeals was therefore warranted in evaluating Ewing's dismissal from Medical School, and the consequent deprivation of his property interest in continued enrollment, under the "arbitrary and capricious" standards of substantive due process.

CONCLUSION

For the foregoing reasons, the constitutional analysis proposed by the Solicitor General should be rejected. On the basis of the analysis set forth in the decision of the Court of Appeals, the judgment below should be affirmed.

Respectfully submitted,

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